No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAIWA SECURITIES AMERICA INC.,

Petitioner,

—against—

FRED KAYNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY P. NAFTALIS
Counsel of Record
ALAN R. FRIEDMAN
STEPHEN M. SINAIKO
JENNIFER L. ROCHON
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioner Daiwa Securities America Inc.

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QUESTIONS PRESENTED

1. Where plaintiffs in *Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, No. 95-CV-2499 (JG) (E.D.N.Y.) ("*Kayne*"), an action including claims under Section 10(b) of the Securities Exchange Act of 1934, reached a partial settlement with defendant BDO Dunwoody ("BDO"), did the Court of Appeals for the Second Circuit err in entering a bar order precluding non-settling defendant Daiwa Securities America Inc. ("Daiwa") from pursuing independent claims against BDO, other than for contribution or indemnity, based on breaches of duties BDO owed directly to Daiwa, to the extent that damages on those independent claims are measured by Daiwa's liability to the *Kayne* plaintiffs?

2. As to the nineteen *Kayne* plaintiffs who first sued Daiwa in 1996 and 1997 -- after the Private Securities Litigation Reform Act ("PSLRA") took effect on December 22, 1995 -- did the Court of Appeals err in failing to apply PSLRA provisions (a) limiting the scope of settlement bar orders so that they may extinguish only claims for contribution, and (b) subject to that scope limitation, requiring that settlement bar orders be mutual, extinguishing contribution claims by *and* against the settling defendant?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. *Plaintiffs-Appellees (Respondents before this Court)*: Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith (as custodian for Milton T. Okun Individual Retirement Accounts); Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International Ltd.; Richard L. Milsner; Joel Rumm; Victor Scaravilli; Tri S Partners; Dreilander Beteiligung Objekt DLF 93/14-Walter Fink-KG and Zwolfte Dreilander Beteiligung DLF 92/12-Walter Fink-KG.

2. *Defendant-Appellee (Respondent before this Court)*: BDO Dunwoody LLP.

3. *Third Party Defendant-Appellee*: HSBC Bank Canada.

4. *Defendant-Appellant (Petitioner before this Court)*: Daiwa Securities America Inc.

5. *Defendants-Appellants*: MTC Electronic Technologies Co., Ltd. (n/k/a GrandeTel Technologies, Ltd.); Edilberto Pozon; Peter Jensen; Thomas Lenagh; Robert Farr; Ugo Doninelli; David Wong and Goodwin Wang.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Daiwa Securities America Inc. states that it is a wholly-owned subsidiary of Daiwa America Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daiwa Securities America Inc. respectfully prays that a writ of certiorari issue to review two aspects of the judgment of the United States Court of Appeals for the Second Circuit, dated May 15, 2003. (App. 1a-26a.)[1]

OPINIONS BELOW

The court of appeals rendered a reported opinion in this case. *See Gerber v. MTC Electronic Tech. Co., Ltd.*, 329 F.3d 297 (2d Cir. 2003) (App. 1a-26a). In its decision, the court of appeals reviewed orders and partial final judgments entered by the district court (Hon. John Gleeson) on November 1, 2001 and January 11, 2002, all of which were unpublished. (App. 27a-45a.) The district court's November 1, 2001 order adopted, with a modification, an unpublished report and recommendation by Magistrate Judge A. Simon Chrein. (App. 46a-71a.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 15, 2003.

This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review on a writ of certiorari the judgment of the court of appeals.

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[1] "App. __" refers to the Appendix annexed to this Petition pursuant to Supreme Court Rule 14.1(i).

STATUTORY PROVISIONS INVOLVED

This case involves application of sections 108 and 201(a) of the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Section 108 of the PSLRA provides:

> The amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act.

Pub. L. No. 104-67, § 108, 109 Stat. 737, 758 (effective Dec. 22, 1995).

Section 201(a) of the PSLRA, in relevant part, provides:

> (7) Settlement discharge
>
> (A) In general
>
> A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action --
>
> (i) by any person against the settling covered person; and

(ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person.

(B) Reduction

If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of --

(i) an amount that corresponds to the percentage of responsibility of that covered person; or

(ii) the amount paid to the plaintiff by that covered person.

Pub. L. No. 104-67, § 201(a), 109 Stat. 737, 760-61 (effective Dec. 22, 1995) (codified at 15 U.S.C. § 78u-4(f)(7)).

STATEMENT OF THE CASE

A. Background of the Action

Between early 1992 and December 1994, the plaintiffs in *Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, No. 95-CV-2499 (JG) (E.D.N.Y.) ("*Kayne*") -- a group of high net worth individuals, hedge funds and other sophisticated investors -- bought on the open market millions of dollars of shares in MTC Electronic Technologies Co., Ltd. ("MTC"), a small, unproven company based in British Columbia that claimed to have opportunities in the telecommunications industry in China and that had conducted its first United States equity offering in November 1991. In this action, the *Kayne* plaintiffs seek to recover the losses that eventually resulted from their speculation in MTC, and much more.

Plaintiffs allege that MTC and its former principals, Miko and Sit Wa Leung (the "Leungs"), made various false statements concerning MTC's China telecommunications ventures in press releases and in public filings relating to the company's second public offering of securities, which became effective in July 1993. Plaintiffs further allege that MTC disseminated misleading proxy materials in the fall of 1994 and falsified sales of facsimile machines in China that were reported as revenue items in the company's fiscal 1991, 1992 and 1993 financial statements, and that the Leungs misappropriated approximately 1.1 million shares of company stock and stock options. Based on these allegations, plaintiffs assert federal securities, RICO, California "blue sky" and common law claims against, among others, MTC, the Leungs, the Individual Defendants,[2] BDO Dunwoody ("BDO") (independent

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[2] "Individual Defendants" refers to Robert Farr, Peter Jensen, Thomas Lenagh, Edilberto Pozon, Goodwin Wang
(footnote continued)

auditors to MTC during the relevant time period), and Daiwa Securities America Inc. ("Daiwa") (underwriter of MTC's 1993 public offering).

Seven of the plaintiffs -- opting out of the *In re MTC* and *Ellis v. Leung* class actions that had been pending in the Eastern District of New York since February 1993 and February 1994, respectively -- commenced *Kayne* on January 23, 1995.[3] By April 1996 and March 1997 amendments to the *Kayne* complaint, 19 additional plaintiffs -- who seek more than three quarters of the total supposed damages in the case -- asserted claims relating to MTC. The district court's subject matter jurisdiction in *Kayne* was founded on 28 U.S.C. §§ 1331, 1367.

B. Background of the Partial Settlements

On December 4, 2000, plaintiffs announced that they had entered into settlement agreements with BDO and with third-party defendants HSBC Bank Canada ("HSBC") and Ronald Driol. The agreements called for payment of $4.075 million by HSBC and Driol and $8 million by BDO. In exchange for these payments, plaintiffs agreed to provide general releases to BDO, HSBC and Driol and to dismiss with prejudice (1) their action against BDO in the

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and David Wong, all former officers and/or directors of MTC named as defendants below.

[3] Plaintiffs commenced *Kayne* in the Central District of California. Subsequently, the Judicial Panel on Multidistrict Litigation ("JPML") transferred *Kayne* to the Eastern District of New York for coordinated or consolidated pretrial proceedings with the MTC-related class actions. On October 14, 1998, the district court approved a settlement of the class actions. That settlement, however, did not apply to *Kayne*.

Eastern District of New York and (2) actions they had commenced against BDO, HSBC and Driol in California state court.

BDO, HSBC and Driol conditioned their agreement to the settlements on, *inter alia*, entry by the district court of bar orders precluding Daiwa and all other persons from asserting (or pursuing) against BDO, HSBC or Driol "any claim or claims based upon, relating to, or arising out of the claims or allegations in *Kayne*," while expressly preserving "any and all claims that [BDO, HSBC or Driol] may own or hold against" Daiwa and others. Plaintiffs, in turn, conditioned their agreement to the settlements on, among other things, either (1) the approval of their proposed allocation of nearly half of the total $12.075 million in settlement proceeds to hypothetical awards of attorneys' fees and prejudgment interest, rather than damages,[4] or (2) the deferral of any decision as to allocation of settlement proceeds until after remand by the JPML.

C. Procedural History of the Orders and Judgments Appealed

BDO, HSBC and Driol, with the *Kayne* plaintiffs' support, moved the district court for entry of bar orders and partial final judgments in connection with their settlements. The district court referred the settlement-related motions to Magistrate Judge Chrein, who issued a Report dated April 24, 2001. (App. 46a-71a.) After considering the parties' objections and other responses to the Report, Judge Gleeson, by orders dated November 1, 2001, January 7,

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[4] Of the $4.075 million settlement payment by HSBC and Driol, Plaintiffs sought to allocate $1.956 million to attorneys' fees and $819,000 to prejudgment interest. Plaintiffs sought to allocate $3.092 million of the $8 million BDO settlement payment to prejudgment interest.

2002 and January 8, 2002 (the "District Court Orders"), adopted the Report with a modification. (App. 27a-45a.) In relevant part, the District Court Orders:

- Barred Daiwa and all other parties from asserting claims against BDO, HSBC and Driol "arising out of or reasonably flowing from the claims and allegations in the *Kayne* Action," specifically including claims against BDO arising from the comfort letters it delivered to Daiwa in connection with MTC's 1993 public offering of securities (App. 29a, 44a-45a, 69a);

- Provided that -- although any MTC-related claims by Daiwa against BDO, HSBC or Driol would be extinguished -- BDO, HSBC and Driol could continue to assert contribution, indemnity or other MTC-related claims offensively against Daiwa and other parties. (App. 44a-45a, 70a);

- Provided that, in the event plaintiffs should prevail at trial, Daiwa would receive a judgment credit in the amount of the greater of (i) the proportionate fault of the settling parties, or (ii) the amounts paid in settlement by the settling parties (App. 44a-45a, 70a); and

- Held that, although 19 of the 26 plaintiffs first asserted MTC-related claims through amendments to the *Kayne* complaint in 1996 and 1997, well after the Private Securities Litigation Reform Act ("PSLRA") took effect on December 22, 1995, those later-added plaintiffs would not be subject to PSLRA provisions (a) limiting the scope of settlement bar orders so that they may extinguish only contribution claims, and (b) requiring that,

> subject to that scope limitation, settlement bar orders must be mutual, extinguishing claims by *and* against the settling defendant. (App. 44a-45a, 65a-66a.)

Daiwa and a number of other defendants appealed the District Court Orders and the related partial final judgments entered on January 11, 2002 to the court of appeals for the Second Circuit.[5] On May 15, 2003, the court of appeals affirmed the district court's orders in part, as modified, and vacated and remanded in part. (App. 26a.)

The panel held that the district court's bar order was overbroad in that it extinguished not only *contribution* claims based upon BDO's share of all defendants' liability to the *Kayne* plaintiffs -- for which judgment credit adequately compensates non-settling defendants -- but also *independent, non-contribution* claims based upon breaches by BDO of duties it owed directly to Daiwa and others. (App. 19a.) However, the panel further concluded that the bar order properly extinguished non-contribution claims to the extent that Daiwa sought to recover from BDO, as damages on those claims, any amounts Daiwa might pay to the *Kayne* plaintiffs. (App. 19a-20a.) The court of appeals,

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[5] While that appeal was pending before the court of appeals, Daiwa and the Individual Defendants reached their own settlements with HSBC and Driol. Accordingly, Daiwa no longer seeks review of the bar order or partial final judgment entered by the district court in favor of HSBC and Driol.

therefore, modified the bar order entered by the district court so as to implement those principles.[6]

The court of appeals further held that settlement-related provisions of the PSLRA -- limiting the scope of settlement bar orders and requiring that they be mutual, *see* 15 U.S.C. § 78u-4(f)(7)(A) -- would not apply with respect to the nineteen *Kayne* plaintiffs who sued after December 22, 1995. (App. 25a-26a.) Applying pre-PSLRA principles, however, the court of appeals found that the district court

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[6] As modified by the court of appeals, the bar order reads:

> Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim for indemnity or contribution against BDO (or any other claim against BDO where the injury to the Non-Settling Defendant is the Non-Settling Defendant's liability to the plaintiffs), arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC, to the extent that the injury to the Non-Settling Defendant under any such claim is its liability to the *Kayne* plaintiffs.

(App. 20a-21a (emphasis in original).)

had failed adequately to weigh the relevant equities in determining to enter a non-mutual bar order precluding contribution or indemnity claims against BDO, while permitting BDO to continue asserting such claims against Daiwa and others. Thus, the court of appeals vacated in part the district court's judgment and remanded the case so that the district court could determine whether the equities demand that any bar order in favor of BDO be mutual. (App. 25a.)[7]

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case because the decision below "raises important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. Rule 10(c); *see also, e.g., American Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 174 (1964) (granting certiorari because the question presented was one of "first impression under the [Labor-Management Reporting and Disclosure Act of 1959]"); *United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (granting certiorari because case "raise[d] questions of importance in the administration of the Agricultural Marketing Agreement Act"). The appropriate scope of settlement bar orders, under the PSLRA and otherwise, is an issue that arises frequently in litigation under the federal securities laws and in other complex, multi-party cases before the federal courts. *See, e.g., McDermott, Inc. v.*

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[7] The court of appeals also resolved issues concerning, *inter alia*, the proper method for calculating the judgment credit that the non-settling defendants will receive at trial and the propriety of plaintiffs' attempt to allocate settlement proceeds between hypothetical awards of damages, prejudgment interest and attorneys fees. (App. 11a-17a.) Daiwa does not, by this Petition, seek review of those rulings.

AmClyde, 511 U.S. 202 (1994); *In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585 (D.N.J. 2001); *In re Rite-Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa. 2001). The decision of the court of appeals in this case is inconsistent with opinions on this point by lower federal courts in the Third and Seventh Circuits holding that claims may still be independent of contribution and indemnity claims even if they seek damages that overlap with the non-settling defendants' liability to the plaintiffs. *See infra* at 14-15. Likewise, a ruling on the temporal reach of the PSLRA will provide needed guidance to the courts of appeals and district courts, both in securities cases -- where courts frequently must apply the PSLRA -- and in other cases involving statutes with similar retroactivity language.

The Court also should grant certiorari because the questions presented raise important issues that are fundamental to the future conduct of this case. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari despite remand for trial because the contesting rulings were "fundamental to the further conduct of the case"); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964) (same). For example, the availability to Daiwa of independent claims for damages against BDO could substantially impact the likelihood of a settlement between the *Kayne* plaintiffs and the remaining non-settling defendants. Moreover, the applicability of the PSLRA to certain plaintiffs will directly address the immediate questions of whether the court of appeals erroneously approved an overbroad bar order and whether a non-mutual bar order is permissible.[8]

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[8] Notwithstanding the remand to the district court for reconsideration as to the mutuality of the bar order in favor of BDO, a writ of certiorari is appropriate at this time because the judgment of the court of appeals -- erroneously
(footnote continued)

I. The Bar Order in Favor of BDO Impermissibly Extinguishes Claims Other Than for Contribution and Indemnity

The court of appeals erroneously approved a settlement bar order in favor of BDO that is overbroad. Under longstanding federal law -- recognized by the court of appeals here -- bar orders entered in connection with partial settlements may preclude *only* claims for which non-settling parties receive compensation through judgment reduction at trial. Thus, a settlement bar order may extinguish contribution and equitable indemnity claims against the settling defendant, based on the settling defendant's liability to plaintiff -- for which judgment reduction adequately compensates non-settling parties -- but may *not* extinguish *independent, non-contribution* claims based on the settling defendant's violation of duties owed directly to non-settling parties. *See, e.g., In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1033 (2d Cir. 1992); *TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir. 1994); App. 19a. Congress codified that principle in the PSLRA, strictly limiting settlement bar orders to contribution claims for which non-settling parties receive

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barring independent claims against BDO -- is causing immediate harm to Daiwa and the other non-settling defendants. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (granting certiorari despite appellate court's remand to district court for reconsideration in part because district court entered an injunction pending appeal). In this regard, we note that the court of appeals' did not direct remand with respect to its determination regarding the proper scope of the BDO settlement bar order.

judgment credit. *See* 15 U.S.C. § 78u-4(f)(7)(A).[9] The judgment below exceeded those boundaries by depriving Daiwa not only of contribution and indemnity claims against BDO, but also of independent claims "where the injury to [Daiwa] is [Daiwa's] liability to the plaintiffs." (App. 20a-21a.)

The court of appeals based its holding as to the appropriate scope of the BDO settlement bar order on the erroneous notion that claims are not "independent" of contribution or equitable indemnity where they seek damages overlapping with the non-settling defendant's liability to the plaintiff. Cogent authority in other circuits is precisely to the contrary. As a number of courts have held, a non-settling defendant's claim against a settling defendant will survive a bar order -- even if the damages overlap with damages that would be available in

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[9] Under the PSLRA, upon approval of a partial settlement, the district court must enter an order barring "all future claims *for contribution* arising out of the action . . . ." 15 U.S.C. § 78u-4(f)(7)(A) (emphasis added). Courts applying the PSLRA have held that a settlement bar order may extinguish *only* claims for contribution. *See In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 283 (D.N.J. 2000) (settlement bar order under PSLRA would not preclude shareholder derivative claims against directors who entered into settlement with plaintiff class, because "independent non-contribution claims against settling defendants . . . are not subject to such a bar"), *aff'd*, 264 F.3d 286 (3d Cir. 2001). As we demonstrate in Point II, *infra*, the Court of Appeals here erred in determining that the PSLRA is not controlling as to plaintiffs who sued in 1996 and 1997. But in any event, that statute is persuasive authority as to the appropriate scope of bar orders respecting the claims of all plaintiffs.

contribution -- as long as the claim requires proof of elements different from or beyond those necessary to establish a contribution or equitable indemnity claim.

For example, in *In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585 (D.N.J. 2001), Cendant and Ernst & Young ("E&Y") entered into a settlement with plaintiffs in a securities fraud class action. Cendant, asserted state law claims for fraud, negligence and breach of contract against E&Y -- like those Daiwa has against BDO in this case -- arising from misrepresentations in a comfort letter E&Y had delivered to Cendant's predecessor, HFS, Inc. Like BDO here, E&Y argued that Cendant's claims were "nothing more than a thinly-veiled attempt to obtain indemnity," and hence precluded by the bar order entered in connection with the class action settlement. *Id.* at 588. The court disagreed, finding that:

> [T]he state law cross-claims here are based upon independent breaches of duty that E&Y owed to [certain co-defendants]. Although some of the damages sought might overlap with the damages for which Cendant was liable to the class under the settlement, they are for independent torts.

Id. at 596.

Similarly, in *In re Sunrise Sec. Litig.*, 793 F. Supp. 1306 (E.D. Pa. 1992), the court refused to dismiss tort and contract claims brought by non-settling defendants against a settling defendant, despite the entry of a bar order in favor of the settling defendant. The court refused to characterize the non-settling defendants' claims as "de facto indemnity claims" simply because the damages sought were premised upon the non-settling defendants' liability to the plaintiffs.

It held:

> The damages that the non-settling defendants seek for their tort and contract claims are similar, although not identical, to the damages that they seek for their indemnification claims. Such an overlap does not necessarily transform the claims into claims for implied indemnity.

Id. at 1321.

In *In re Cenco Inc. Sec. Litig.*, 642 F. Supp. 539 (N.D. Ill. 1986), yet another court rejected the rule adopted by the court of appeals here. Plaintiffs in that case asserted claims arising from alleged inaccuracies in the financial statements of Cenco, Inc. After Cenco reached a settlement with the plaintiff class, Seidman & Co., Cenco's independent auditor and a defendant in the case, sued Cenco for fraud. The court held that Seidman's tort claims against Cenco survived Cenco's settlement with the class plaintiffs and were not disguised indemnification claims. *Id.* at 542. Even though Seidman sought damages from Cenco that encompassed the settlement payments that it made to the class plaintiffs, the court refused to find the contested claim to be an indemnification claim:

> The gist of Seidman's fraud claim is not that it is more equitable that Cenco pay for Seidman's loss to the class, but that Cenco has committed a tort on Seidman, and must pay damages for this, damages which happen to encompass the settlement payment. That this element of damage *overlaps* what Seidman maybe could have recovered through indemnity does not *make it* indemnity.

Id. (emphasis in original).

The damages to which Daiwa and the other non-settling defendants are entitled on their claims against BDO -- particularly on Daiwa's comfort letter claims -- include damages separate from non-settling defendants' liability to plaintiffs, such as litigation expenses, reputational damages and lost business opportunities. As concluded in the cases cited above, the possibility that non-settling defendants' damages may include their liability to the plaintiffs does not transform otherwise independent claims into claims for contribution or indemnity for which Daiwa and the other non-settling defendants have received compensation in the form of judgment credit. Because the non-settling defendants are currently enjoined from asserting claims they are entitled to bring, and given the unsettled state of the law, certiorari is appropriate.

II. The PSLRA Applies to the *Kayne* Plaintiffs Who First Sued in 1996 and 1997

The court of appeals also erred in holding that settlement-related provisions of the PSLRA -- providing that settlement bar orders may preclude only contribution claims, and must preclude such claims by *and* against settling defendants -- do not apply to the 19 (out of 26) *Kayne* plaintiffs who sued Daiwa and the Individual Defendants in 1996 or 1997, well after the PSLRA took effect. Section 108 of the PSLRA expressly directs that the PSLRA's provisions relating to settlement in securities actions "shall not affect or apply to any private action [under the Securities Exchange Act of 1934 (the 'Exchange Act')] commenced before and pending" on December 22, 1995. Courts have interpreted section 108 to require application of the PSLRA to all Exchange Act claims

asserted after that date.[10] Focusing on the distinction between "claims" and "actions," the court of appeals found that *Kayne* plaintiffs who first sued in 1996 or 1997 -- *after* December 22, 1995 -- would not be subject to the PSLRA because they asserted their claims through amendments to the *Kayne* complaint, rather than by filing separate complaints of their own. (App. 25a-26a.) That unduly formalistic reasoning, however, defeats express legislative intent that the PSLRA have (at a minimum) immediate, prospective effect.

At least one court has rejected the approach taken by the court of appeals in an analogous situation. In *Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235 (S.D.N.Y. 1992), a group of plaintiffs filed an action alleging, *inter alia*, a claim under section 10(b) of the Exchange Act in December 1989, and then amended their complaint in July 1991 and October 1991 to assert claims on behalf of additional plaintiffs. *Id.* at 1237-38. As a result of the retroactive application of the Supreme Court's June 1991 decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), plaintiffs' section 10(b) claim became untimely. Responding to *Lampf*, Congress enacted section 27A of the Exchange Act in December

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[10] *See, e.g., Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1351 n.1 (S.D. Cal. 1998) ("By its own terms, the PSLRA applies to any action commenced after December 22, 1995."); *Havenick v. Network Express, Inc.*, 981 F. Supp. 480, 523 (E.D. Mich. 1997) (PSLRA applicable in all respects to claims asserted after effective date); *Hockey v. Medhekar*, No. C-96-0815, 1997 WL 203704, at *4 (N.D. Cal. Apr. 15, 1997) ("the [PSLRA] applies to all private securities actions filed after December 22, 1995").

1991, providing as follows:

> Any private civil *action* implied under section 10(b) of this Act that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Adler, 790 F. Supp. at 1237-38 (*quoting* Section 27A) (emphasis added). Following the enactment of section 27A, all plaintiffs -- including those who had joined the action by amendments to the complaint -- sought reinstatement of their section 10(b) claims. Judge Conner denied that application as to plaintiffs who joined the action through the July 1991 and October 1991 amendments, ruling as follows: "Plaintiffs who joined this action by Amendments to the Complaint on July 2, 1991 and October 7, 1991 are not entitled to move for reinstatement under Section 27A. The plain language of the statute permits reinstatement only of *claims* commenced prior to June 20, 1991." *Id.* at 1238 (emphasis added).

While the court of appeals disagreed with *Adler*, we respectfully submit that its rejection of plaintiffs' formalistic argument is compelling and applies directly to this case. Like the statute at issue in *Adler*, section 108 of the PSLRA exempts "any private *action* [under the Exchange Act] commenced before and pending" on December 22, 1995. As in *Adler*, plaintiffs who asserted

their claims in 1996 and 1997 seek -- but should not be permitted -- to avoid the PSLRA by "joining this action."[11]

The holding of the court of appeals also has negative policy implications in that it permits plaintiffs, through formalistic maneuvering, to avoid the effect of an act of Congress. By focusing on a non-substantive distinction between "claims" and "actions," the ruling below

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[11] The court below reached its result in misplaced reliance upon *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293 (D.N.J. 1997). That decision, however, did not involve an attempt by plaintiffs to avoid the restrictions of the PSLRA by asserting claims through amendment to a previously-filed action. In *McKowan*, Magistrate Judge Kugler merely considered whether parties named in 1996 as additional defendants to a securities fraud class action commenced on November 17, 1995 would be entitled to the PSLRA's stay of discovery pending determination of motions to dismiss. *Id.* at 294-95. Since, under section 108, the PSLRA's stay on discovery did not apply to the defendants originally named in the case, discovery would have proceeded in the case regardless of the court's ruling as to the later-added defendants. Moreover, the PSLRA permits district courts, under appropriate circumstances, to lift the otherwise-applicable stay on discovery. *See* 15 U.S.C. § 78u-4(b)(3)(B). Finally, even if the newly-added defendants ultimately were dismissed from the case, they would have been subject to discovery as non-parties. Thus, the magistrate judge's decision in that case not to stay discovery under the PSLRA is unremarkable. In any event, the ruling in *McKowan* -- relating only to the timing of discovery in a complex class action -- does not address the PSLRA's effect on BDO's partial settlement with *Kayne* plaintiffs who first sued for securities fraud in 1996 and 1997.

effectively renders the PSLRA's modifications to the Exchange Act a nullity until every case filed before December 22, 1995 (to which some plaintiff could join) had been concluded -- despite the command of section 108 that the PSLRA govern all claims asserted after its enactment. The court of appeals should not have denied effect to the PSLRA in that fashion. *Cf. Buitrago-Cuesta v. I.N.S.*, 7 F.3d 291, 294-95 (2d Cir. 1993) (retrospectively applying statute barring certain persons who had been imprisoned five years from obtaining waiver of deportation, on ground that failure to do so would render statute a nullity for five years).

CONCLUSION

For the reasons set forth above, this Court should grant Daiwa's petition for a writ of certiorari to review the judgment of the court of appeals.

Dated: August 13, 2003

Respectfully submitted,

GARY P. NAFTALIS
Counsel of Record
ALAN R. FRIEDMAN
STEPHEN M. SINAIKO
JENNIFER L. ROCHON
KRAMER LEVIN NAFTALIS &
FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 3, 2003 Decided: May 15, 2003)

Docket Nos. 02-7023 (Lead), 02-7026 (Con), 02-7083 (Con), 02-7084 (Con), 02-7143 (Con), 02-7147 (Con) and 02-7215 (Con)

MICHAEL GERBER, HOWARD MAYER and BARRY W. FELDMAN,

Plaintiffs,

FRED KAYNE, OPPENHEIMER & CO., a Delaware Corporation, as custodian for Fred Kayne Individual Retirement Accounts, STEPHEN KAYNE, DON WOHL, MILTON T. OKUN, ROSEMARY OKUN, GLENN TOBIAS, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation, as CUSTODIAN for Milton T. Okun Individual Retirement Accounts, KEN BERG, ROBERT A. BRONSTEIN, BRONSTEIN FAMILY TRUST, BRUCE BURNAM, MARCIA BURNAM, KATHLEEN A. COHEN, WILLIAM CORBETT, CUTLER FAMILY TRUST OF 1989, MARTIN GOLDFARB, RICHARD GUNTHER, HARPEL PARTNERS, L.P., HARPEL WHEELOCK PARTNERS, L.P., HARPEL INTERNATIONAL, LTD., RICHARD L. MILSNER, JOEL RUMM, VICTOR SCARAVILLI and TRI S PARTNERS and TODD ELLIS, JOSEPH MEYER, LEONA

MOGA, TERRY SCHULTZ, EDDY SHERMAN, KENNETH STEINER, AUDREE YORKES, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

MTC ELECTRONIC TECHNOLOGIES CO., LTD.,

Defendant-Counter-Defendant-Appellant,

BDO DUNWOODY WARD MALLETTE,

Defendant-Third-Party-Plaintiff-Appellee,

ALAN LEUNG,

Defendant-Cross-Claimant,

HSBC BANK CANADA and RON DRIOL,

Third Party-Defendants-Cross-Claimants-Appellees,

MIKO LEUNG, H.J. MEYERS & CO., INC. and SIT WA LEUNG,

Defendants-Cross-Defendants,

—v.—

DAIWA SECURITIES AMERICA, INC.,

Defendant-Cross-Claimant-Appellant,

ROBERT C. FARR; PETER JENSEN; THOMAS LENAGH; EDILBERTO V. POZON; GOODWIN WANG; DAVID WONG,

Defendants-Counter-Defendants-Appellants,

LEVESQUE SECURITIES, INC., MERIDIAN SECURITIES INTERNATIONAL LIMITED, MAURICE LEE, CANACCORD CAPITAL CORP., FIRST CANADA SECURITIES, LEIB ORLANSKI, FRESHMAN, MARANTZ, ORLANSKI, COOPER & KLEIN, HARLEY GLECKMAN and WALL STREET FINANCIAL CORP.,

Defendants.

Before:

JACOBS, POOLER and SOTOMAYOR,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (John Gleeson, *District Judge*), approving settlements between defendants-appellees BDO Dunwoody, HSBC Bank Canada and Ron Driol and plaintiffs-appellees.

Appellants, the non-settling defendants, challenge the district court's approval of the settlements, arguing that the district court's order relating to the allocation of a judgment credit impermissibly creates a risk that the non-settling defendants will not receive the full credit to which they are entitled, and that the bar order approved by the district court extinguishing claims of the non-settling defendants against the settling defendants is both overbroad and non-reciprocal. They also contend that the district court impermissibly deferred resolution of the exact amount of the judgment credit until trial, and that the district court erroneously held that the PSLRA does not apply to this action. We hold that the district court

correctly deferred allocation of the judgment credit until after trial, and approve the bar order with a modification to ensure that any claims by the non-settling defendants with independent damages are not extinguished. We also hold that the PSLRA does not apply to the claims of the nineteen plaintiffs who were added by amendment to the complaint after the statute's effective date. Because the district court did not fully consider the competing equities of a mutual as compared to a non-mutual bar order, we vacate the district court's entry of a non-mutual bar order in the BDO settlement and remand for further consideration.

Affirmed in part as modified, vacated in part and remanded.

LAWRENCE H. NAGLER, Nagler & Associates, Los Angeles, CA (David F. Berry, of counsel), *for plaintiffs-appellees*.

GARY P. NAFTALIS, Kramer Levin Naftalis & Frankel LLP, New York, NY (Alan R. Friedman, Stephen M. Sinaiko, Jennifer L. Rochon, J. Wells Dixon, of counsel, Bruce S. Kaplan, Friedman Kaplan Seiler & Adelman LLP, New York, NY, on the brief), *for defendant-cross-claimant-appellant Daiwa Securities America, Inc. and defendants-counter-defendants-appellants MTC Electronic Technologies Co., Ltd., Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Goodwin Wang, and David Wong*.

GREGORY A. MARKEL, Cadwalader, Wickersham & Taft LLP, New York, NY (Paul R. Bessette, Austin, TX, on the brief), *for defendant-third-party-plaintiff-appellee BDO Dunwoody.*

SOTOMAYOR, *Circuit Judge*:

Defendant-cross-claimant-appellant Daiwa Securities America, Inc. ("Daiwa"), defendants-counter-defendants-appellants MTC Electronic Technologies Co., Ltd. ("MTC") and Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Goodwin Wang, and David Wong (collectively "the individual defendants") appeal from a judgment of the United States District Court for the Eastern District of New York (John Gleeson, *District Judge*) approving partial settlements between plaintiffs-appellees and defendants-appellees BDO Dunwoody ("BDO"), and HSBC Bank Canada ("HSBC") and Ron Driol, an HSBC executive.

Appellants (collectively "the non-settling defendants") contend that the district court erred in approving the partial settlements without ensuring that their settlement judgment credit would be at least the total amount paid by the settling defendants and by deferring determination of the exact amount of the credit until trial. They also take issue with the district court's approval of a settlement bar order extinguishing any claims against BDO relating to or arising from the allegations of this litigation. According to the non-settling defendants, any bar order should be narrowed to include only indemnity and contribution claims, and should also impose a reciprocal bar on claims by BDO. Alternatively, the non-settling defendants argue that at least with respect to the settle-

ment of the claims of those plaintiffs added by amendment to the complaint after the effective date of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.), the bar order must be mutual.

We affirm the district court's orders in part. We hold that the court's deferral of the allocation of particular settlement amounts to various elements of damages for purposes of calculation of the non-settling defendants' judgment credit was not erroneous, and conclude that, in light of the concessions made by plaintiffs on appeal, the non-settling defendants will receive a credit that is at least the settlement amount for common damages. We also affirm, with a slight modification, the district court's bar order extinguishing the claims of the non-settling defendants for indemnity and contribution, and any other claims where the damage to the non-settling party is measured by its liability to the plaintiffs for claims relating to this action. We vacate and remand that part of the district court's order relating to the mutuality of the bar order because we find that the magistrate judge, whose recommended ruling the district court adopted, did not fully consider the competing equities involved in the mutual and non-mutual rules. Finally, we agree with the district court that the PSLRA does not apply to any of the added plaintiffs in this action, which was commenced prior to that statute's effective date.

BACKGROUND

I. The Litigation

MTC was a company based in British Columbia that purportedly had binding joint ventures regarding the

operation, manufacture and sale of telecommunications equipment in China. Plaintiffs are a group of investors who purchased shares of MTC common stock between 1992 and 1994. MTC allegedly raised over $70 million in a secondary offering in 1993, which was underwritten by defendant Daiwa. Defendant BDO Dunwoody ("BDO") was MTC's auditor during the time period at issue. Plaintiffs allege that MTC's purported telecommunications joint ventures were fraudulent and materially misrepresented. As a result, plaintiffs claim to have incurred trading losses in MTC stock of more than $15 million.

Nine of the named plaintiffs filed suit against MTC, its principals (Miko Leung and Sit Wa Leung), various MTC officers and directors (the individual defendants), Daiwa and BDO in the Central District of California on January 23, 1995, alleging securities fraud, RICO violations and state law claims of fraud, negligent misrepresentation, and breach of fiduciary duty ("the *Kayne* action"). Because plaintiffs' allegations were similar to those of two class actions then pending against MTC in the Eastern District of New York, the *Kayne* action was transferred to Judge Gleeson by the Judicial Panel on Multidistrict Litigation for coordinated pre-trial proceedings. Plaintiffs moved to amend their complaint to add seventeen additional plaintiffs in April 1996, and two more in March 1997. The individual defendants and BDO filed third-party claims against HSBC and Ron Driol, an HSBC officer, alleging that they assisted in the misappropriation of MTC stock by the Leungs. Plaintiffs then sought leave to add HSBC and Driol as defendants. That motion was denied, and the plaintiffs filed a state court action in California asserting federal RICO and state common law fraud claims against HSBC and Driol. These claims were consolidated with a California state

court action that had previously been filed by the seventeen plaintiffs who were added to the federal action in April 1996, and both state court actions were stayed pending the outcome of the proceedings before Judge Gleeson. The two original MTC class actions settled; this action remains pending in the Eastern District of New York before Judge Gleeson.

II. The Settlements

In late 2000, plaintiffs reached an $8 million settlement with BDO purporting to allocate $4,907,975.50 to out-of-pocket damages and $3,092,024.50 to pre-judgment interest. Plaintiffs also reached a $4,075,000 settlement with HSBC and Driol, allocating $1,300,000 to out-of-pocket damages, $819,000 to prejudgment interest, and $1,956,000 to attorneys' fees (which are recoverable under RICO). In exchange, plaintiffs agreed to release BDO, HSBC and Driol for all claims they might have against the settling defendants in any forum, related in any way to the MTC litigation.

These settlements were submitted to the district court for approval, and were referred to Magistrate Judge Chrein for a recommended ruling. The settling parties sought an order finding that the settlements were good faith settlements under California and federal law, barring claims by the non-settling defendants while preserving the claims of the settling defendants, dismissing the claims pending in the Eastern District of New York, and approving the allocation of damages while leaving the determination of any judgment credit for the non-settling defendants until after trial. Although plaintiffs had made settlement contingent on the district court's adoption of their specific allocations, they subsequently agreed to finalize the settlements if the propriety of the

allocations within the settlement figure was left to the trial judge.

III. Rulings Below

In a recommended ruling, Magistrate Judge Chrein held that a "capped proportionate share" rule would determine the amount of the judgment credit to which the non-settling defendants are entitled on the state and federal claims. Under such a rule, the credit is the *greater* of the settlement amount for common damages or the settling defendants' share of liability as proven at trial. The magistrate judge observed that this "rule ensures that no matter how the settlement funds are distributed as between damages and other elements, the non-settling defendants will never be required to pay more than their proportionate share of an award as determined by the trier of fact."

The magistrate judge also rejected the non-settling defendants' argument that the PSLRA applied to the claims of the nineteen plaintiffs who joined the suit by amendment after the statute's effective date. The magistrate judge found that the PSLRA did not apply to those plaintiffs because the *Kayne* action was "commenced" on the date they filed the original complaint, not the date the plaintiffs were added.

Finally, the magistrate judge held that a bar order extinguishing "any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action" was proper because the non-settling defendants would be adequately protected by the judgment credit. With respect to whether the bar order should also bar the settling defendants from asserting contribution or indemnity claims against the non-settling defendants, the magistrate judge noted that a district court in this Circuit had

previously held that settling defendants should be allowed to seek contribution from non-settling defendants to achieve equitable apportionment of damages among defendants. *See In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994). While expressing concern that "[a] rule which allows settling defendants, who are buying 'peace of mind' and avoiding the costs and risks of litigation, to seek contribution from [the non-settling] defendants who bore the risk [of litigation] . . . seems unfair," the magistrate judge stated that he "fe[lt] obliged to follow the only precedent in this Circuit especially given that the [non-settling defendants] were on the receiving end of this benefit in the [prior] class settlement." The magistrate judge then approved those portions of the bar orders preserving the settling defendants' claims against the non-settling defendants.

The parties filed objections and requests for clarification, which were considered by the district court. Judge Gleeson adopted the magistrate judge's recommendations in their entirety with one modification, holding that "if a judgment is obtained against a non-settling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements. Rather, allocations of amounts within those gross figures (to damages, prejudgment interest and attorneys' fees) shall be subject to the discretion of the trial court."

MTC, the individual defendants, and Daiwa have appealed. Plaintiffs have responded to the appeal on the question of the calculation of the judgment credit, the district court's deferral of that calculation, and the applicability of the PSLRA. BDO has responded on the issue

of the scope and non-mutuality of the bar order and the applicability of the PSLRA.[1]

DISCUSSION

I. Standard of Review

"A court can endorse a settlement only if 'the compromise is fair, reasonable and adequate.' " *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)). This Court has also observed that "where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval." *Id.* Although the district court normally has discretion to approve a settlement, we may review the district court's decision *de novo* where an appellant's challenge to the authority of the district court to approve the settlement raises novel issues of law. *Id.*

II. The Judgment Credit

We begin by noting the first of several issues that are not in dispute in this appeal. No party challenges the magistrate judge's determination that the non-settling defendants' judgment credit will be calculated using a "capped proportionate share" formula. Under this rule, the credit given for the settlements will be the greater of the settlement amount for common damages (a "*pro tanto*" rule) or the "proportionate share" of the settling defendants' fault as proven at trial. Although we do not

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[1] The individual defendants and Daiwa have settled with HSBC and Driol.

hold that such a formula is required, we agree with the magistrate judge's conclusion that the cap, which ensures that a judgment credit is at *least* the amount of the settlement for common damages, complies with this Circuit's "one satisfaction" rule, which prohibits a plaintiff from recovering more than "one satisfaction for each injury." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989); *see also Masters*, 957 F.2d at 1030 ("[W]here a settlement and a judgment compensate a plaintiff for the same injury, a nonsettling defendant is entitled to a judgment reduction at least in the amount of a prior settlement.").[2] By awarding a credit that is at least the settling defendants' proven share of liability, the non-settling defendants' rights are protected even without a determination of the fairness of the settlement. *See id.* at 1029 ("Because the credit determination [under a proportionate fault method] is made after a

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[2] In Singer, the plaintiff had sued two parties for related securities fraud and RICO claims in separate lawsuits in New York and Illinois. Singer, 878 F.2d at 598-99. The plaintiff prevailed against one party at trial on the securities claims, for a total damages award of approximately $3,000,000 including prejudgment interest; the RICO claim was dismissed before trial. Id. The plaintiff then settled with the other defendant for $1,250,000. Id. at 597. The district court credited the full amount of the settlement toward the judgment, and the plaintiff appealed, arguing that the settlement of the second action included settlement of the RICO claim, which might have exposed the defendant to treble damages. As a result, the plaintiff sought to offset the settlement against a hypothetical trebled damages award (using the actual damages awarded at trial), which would have resulted in the first defendant receiving no benefit from the set-off. Id. at 600. We rejected this argument, "declin[ing] to journey with [the plaintiff] down this road of speculation" because there had been no adjudication that anyone was liable to the plaintiff on the RICO claim:

determination of liability, the proportionate method is always consistent with fault.").

Despite the parties' agreement on the method of calculation of the credit, the non-settling defendants argue that the district court's orders create a possibility that they will receive less than the full amount of the settlement as a judgment credit, allegedly in violation of the one satisfaction rule. They also contend that they are entitled to know the amount of their credit, not merely the method of calculation, before trial. For the reasons that follow, we disagree.

The settling parties here attempted to allocate the settlements to three elements of "damages" purportedly suffered by the plaintiffs: out-of-pocket damages, prejudgment interest, and attorneys' fees.[3] On appeal, plaintiffs have conceded that in any of three possible scenarios, the judgment credit will be at least the full

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> Although . . . the settling defendant may well have considered its possible exposure to treble damages in deciding to settle, it would be entirely speculative for us, absent a finding of liability on the RICO claim, to treble in the settled Illinois case the actual damages awarded in the tried New York case.

Id. at 601. Here, in contrast to *Singer*, plaintiffs are headed to trial against the non-settling defendants on the RICO and state law claims under which they seek attorneys' fees and prejudgment interest. Thus, whether there will be an award entitling plaintiffs to recover these elements of damages may not be speculative. For our purposes, *Singer* suggests that where a plaintiff loses on a claim at trial, the plaintiff cannot allocate a portion of the settlement to damages for that losing claim in order to reduce a non-settling defendant's judgment credit; instead, the judgment credit is to be the full amount of the settlement for common damages.

[3] The references to "damages" as allocated in the settlements and the district court's orders are somewhat unclear. The entire settlement amount is a payment of "damages" by the settling defendants

amount of the settlement for common damages. First, if plaintiffs prevail at trial on claims that entitle them to prejudgment interest (the state law claims, and, at the discretion of the trial court, the federal securities claims) or attorneys' fees (the RICO claims), they do not disagree that the non-settling defendants may use any amounts the district court allocates to these elements of damages to set off their liability on those elements respectively. Further, plaintiffs have also agreed that if the settlement money allocated to prejudgment interest exceeds the jury's award on this element, "any remaining portions can be used to offset out-of-pocket damages." Brief for Plaintiffs-Appellees at 12. (The plaintiffs presumably would concede the same with respect to the portion of the settlement allocated to attorneys' fees.) Finally, plaintiffs have acknowledged that they cannot allocate *any* of the settlement to attorneys' fees or prejudgment interest if plaintiffs do not prevail on claims entitling them to these types of damages:

> If . . . it is determined [that] Plaintiffs are *not* entitled to prejudgment interest, *all portions of the settlements allocated to prejudgment interest could be used as an offset against any award of out-of-pocket damages.* The same holds true for the attorneys' fees portion of Plaintiffs' settlement with the Bank if Plaintiffs do not prevail at trial on their RICO claims against the Non-settling Defendants.

Id. (emphasis added). As plaintiffs have conceded that the judgment credit will be at least the full amount of the settlement, regardless of how these various elements of

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to the plaintiffs. Within the broad category of damages, the allocation was to out-of-pocket damages, attorneys' fees and prejudgment interest.

damages are allocated at trial, the non-settling defendants' fears that they will receive less than their full settlement credit or that the one satisfaction rule will be violated are unfounded.[4]

Despite these concessions, the non-settling defendants express concern that the district court held that "if a judgment is obtained against a nonsettling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements." The district court's order is accurate, however, insofar as only the portion of the settlement attributable to *common* damages will be credited. *See Masters*, 957 F.2d at 1031 ("Absent a showing that damages are not common, a nonsettling defendant whose rights against settling defendants are to be barred is entitled to judgment reduction at least in the amount paid by all settling parties."); *Singer*, 878 F.2d at 600 ("[W]hen a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages.").

We also conclude that the non-settling defendants are not entitled to any greater degree of certainty about the amount of their judgment credit than they already have. Consistent with *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 157 (4th Cir. 1991), relied upon by the non-settling defendants, the district court's orders informed the parties well before trial of the method that

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[4] Inasmuch as no party has articulated any reason that the credit should be allocated in any particular way among the various elements of damages, we leave this issue, as well as the fairness of the allocations that the settling parties originally agreed upon, for the district court to consider after trial if necessary.

will be utilized to calculate the set-off. The non-settling defendants know that they will get a credit amounting to the greater of (1) the settlement attributed to common damages, or (2) the settling defendants' proportionate share of the total damages. They therefore know that the settling defendants' wrongdoing is relevant, and can develop their trial strategy accordingly. We find no error in the district court's decision to leave the determination of the actual amount of the judgment credit for calculation at trial because the non-settling defendants will get at least the full settlement amount as a credit, unless the settlement damages are not common, an issue which is obviously contingent on the outcome of the trial.[5]

Accordingly, we construe the bar orders approved by the district court, consistent with plaintiffs' concessions on appeal and with *Singer*, as indicating that the non-settling defendants' judgment credit will be the greater of the settling defendants' proportionate share of liability

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[5] We note two issues relating to the commonality of damages that may be relevant to the trial court's calculation of the judgment credit. Plaintiffs have argued that if the non-settling defendants prevail at trial on their theory that they are only responsible for a particular set of injuries that are distinct from the damages caused by the settling defendants, and therefore are not held jointly and severally liable for the harm caused by the settling defendants, there would be no basis for granting a judgment credit in the full settlement amount because the settlement would not represent "common" damages. In addition, plaintiffs maintain that if only some of them were to prevail at trial, the judgment credit should be the greater of (1) the amount that the prevailing plaintiffs received of the settlement, or (2) the settling defendants' proven share of liability, again because the one satisfaction rule bars recovery for a particular plaintiff only to the extent that the plaintiff has already received compensation for his proven damages. We take no position on these issues at this time.

or the amount of the settlements attributable to common damages, regardless of how the settlement amounts are ultimately allocated or re-allocated among out-of-pocket damages, prejudgment interest and attorneys' fees. So construed, the orders are affirmed as they relate to the calculation of the judgment credit.

III. Scope of the Bar Order

With respect to the scope of the bar order entered by the district court, the parties' disagreement is again quite limited. The non-settling defendants do not dispute that the district court properly barred their contribution and indemnification claims. *See Masters*, 957 F.2d at 1031-32 (approving settlement bars of claims for indemnity and contribution if the non-settling defendant received a judgment credit of at least "the amount paid by settling defendants toward damages for which the nonsettling defendant would be jointly and severally liable"). They also clarified at oral argument that a "disguised" contribution or indemnity claim, such as a negligence claim where the injury to the non-settling defendants was their liability to the plaintiffs, could be barred. Instead, the non-settling defendants argue that the district court's bar order is too broad in that it extinguished "independent" claims, including claims arising from comfort letters issued by BDO to Daiwa in connection with underwriting of the 1993 secondary offering. The settling defendants, in turn, claim that they seek to bar only those claims where damages are calculated based on the non-settling defendants' liability to the plaintiffs. In a potentially contradictory position, however, BDO also maintains that it is entitled to a broader bar of any claims related to the transaction giving rise to its

involvement in this litigation, namely, the certification of MTC's financial statements.[6]

In *Masters*, we addressed the extinguishment of indemnity and contribution claims under a *pro tanto* recovery rule, and required a hearing on the fairness of the settlement to "protect the due process rights of third parties" in recognition of the possibility of collusion between the settling parties. 957 F.2d at 1031. Under the capped proportionate share rule adopted by the courts below, however, no such fairness hearing is necessary because the non-settling defendants' credit will be the *greater* of the proportionate fault or the settlement amount. By ensuring that, at the end of the day, the non-settling defendants are not held responsible for any damages for which the settling defendants are proven liable, the judgment credit adequately compensates the non-settling defendants for their indemnity and contribution claims, as well as for any other claims where the harm to the non-settling defendants is based on their liability to the plaintiffs. *See id.* at 1029-31.

Daiwa argues that the bar order impermissibly extinguishes "independent claims" that do not relate to any duty owed by BDO to plaintiffs, but rather involve a relationship between BDO and Daiwa based on the issuance of the comfort letters by BDO to Daiwa. If, however, Daiwa proves at trial that it acted as it did in reasonable reliance on BDO's comfort letters, the jury's

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[6] The individual defendants and Daiwa reached a settlement with HSBC and Driol, but MTC—which apparently has not settled with these parties—has joined in the arguments made by the individual defendants and Daiwa. We therefore discuss both the BDO and HSBC/Driol settlements, although we note that several arguments relate solely to the relationship between Daiwa and BDO.

apportionment of liability to BDO, and the judgment credit that results from that apportionment, will adequately protect Daiwa for any damages it owes to plaintiffs. To the extent that Daiwa and the other non-settling defendants were injured by their reliance on the comfort letters *only* inasmuch as they owe damages to plaintiffs as a result of that reliance, those claims were properly extinguished.

This resolution of the scope of the bar order corresponds with BDO's position that those claims where damages are calculated based on the non-settling defendants' liability to the plaintiffs should be barred. More problematic is BDO's alternative position that it is entitled to peace of mind on all claims arising out of the duties it may have breached with respect to the certification of the MTC financial statements, without regard for whether Daiwa might have a claim for damages that goes beyond its liability to the plaintiffs. It may well be, as BDO argues, that the non-settling defendants are only damaged to the extent they are liable to the plaintiffs in the underlying litigation. If, however, Daiwa were to prove that it sustained independent reputational damages or losses relating to the cost of defense arising out of a breached contractual or fiduciary relationship with BDO, it has not been compensated for those losses by the judgment credit, and any such claims should not be extinguished. *See TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994) ("Courts that have allowed bar orders have only barred claims in which the damages are 'measured by' the defendant's liability to the plaintiff. Besides contribution and indemnity claims, these include any claims in which the injury is the nonsettling defendant's liability to the plaintiff. No court has authorized barring claims with independent damages." (citations omitted)); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495-96 (11th

Cir. 1992) (holding that the district court properly barred fraud and negligence claims against the settling defendants because those claims were simply another theory for recovering the damages the non-settling defendant had to pay to the plaintiff). The issue, in other words, is less one of independent "claims" than independent "damages."

We express no view on the likely merit of any claims for independent damages that the non-settling defendants may assert. We also recognize that the orders' reference to claims "arising out of or reasonably flowing from the claims or allegations in the *Kayne* action" may have been intended to encompass only claims where damages are based on liability owed by the non-settling defendants to the *Kayne* plaintiffs. In light of the position taken by BDO in this appeal, and in the absence of any finding from the courts below that no such claims exist, however, a modification to the bar orders is necessary to ensure that the only claims that are extinguished are claims where the injury is the non-settling defendants' liability to the plaintiffs.[7] Accordingly, the BDO settlement order approved by the district court is modified as follows:

> Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim *for indemnity or contribution* against BDO *(or any other claim against BDO where the injury to the Non-Settling Defendant is*

[7] We have the authority to "affirm, modify, vacate, set aside or reverse any . . . order of a court lawfully brought before [us] for review . . . ." 28 U.S.C. § 2106; see, e.g., Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002) (affirming the judgment of a district court with a modification).

the Non-Settling Defendant's liability to the plaintiffs), arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC, *to the extent that the injury to the Non-Settling Defendant under any such claim is its liability to the* Kayne *plaintiffs*.[8]

IV. Non-Mutuality of the Bar Order

The non-settling defendants also object to the fact that the bar orders are "non-mutual," in that they bar the non-settling defendants from bringing contribution and indemnity claims against settling defendants without imposing a reciprocal bar on the settling defendants, which remain free to seek indemnity or contribution from the non-settling parties. According to the non-settling defendants, if the settling defendants "overpaid for the privilege [of avoiding the risks and expenses of further litigation in this case, they] should not be able to recover from Non-Settling Defendants who undertook those risks and expenses by choosing to defend rather than accede to plaintiffs' demands."

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[8] To the extent necessary to protect the rights of any parties to this appeal, the district court is instructed to make a similar modification to the HSBC/Driol settlement bar order.

In approving the entry of the non-mutual bar orders here, the magistrate judge cited *In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994), in noting that "[o]ne court in this Circuit has considered the issue and determined that settling defendants should be allowed to seek contribution from non-settling defendants, reasoning that reduction by the [capped proportionate share] rule adheres to the one-satisfaction rule while permitting settling defendants to seek contribution fosters equitable apportionment of damages among defendants." The magistrate judge then expressed concern that such a rule "seem[ed] unfair" because it allowed the "settling defendants, who are buying 'peace of mind' and avoiding the costs and risks of litigation, to seek contribution from other defendants who bore the risk in the event they settled for too much." The magistrate judge, however, then stated that he "fe[lt] obliged to follow the only precedent in this Circuit especially given that the [non-settling defendants] were on the receiving end of this benefit in the class settlement," and recommended approval of a non-mutual bar.

The magistrate judge's expressed view that he was "obliged" to follow a non-binding district court decision, notwithstanding his concern that such a rule "seem[ed] unfair," convinces us that a remand for further consideration of the issue is warranted. Before approving a non-mutual bar order, the magistrate judge should have balanced the competing equities.

Ordinarily, in settling a case, the defendant bears the risk of overpayment and the plaintiff bears the risk of accepting a damages award lower than what would have been proved at trial. Each side may benefit from the possibility that the other side has paid too much (or accepted too little), and is sure to benefit from the assur-

ance of a fixed payment. The risk is evenly distributed to both settling parties. The one satisfaction rule, however, complicates this balancing where there are multiple defendants but only a partial settlement: if the plaintiff settles with one defendant and goes to trial against another, it loses any benefit from the possibility that the settling defendant overpaid, because the judgment credit ensures that the plaintiff will not recover more than its total *proven* damages. As a result of the one satisfaction rule, if the settling defendant overestimates its proportion of plaintiff's damages, the non-settling defendant pays the plaintiff less than that non-settling defendant's proven liability. The question, then, is whether non-settling defendant should be entitled to the benefit of the settling parties' miscalculation. Although neither of the two possible rules is entirely unproblematic, a mutual rule may avoid creating incentives for collusion between the settling parties, while not putting the settling defendant at any unfair disadvantage.

Under BDO's suggested non-mutual method, the settling defendant knows that it will never pay more than its proportionate fault, because it can seek contribution from the non-settling defendant in the event that its settlement payment is for more than its proportionate fault. The settling defendants thus obtain the benefit of a cap on exposure without any risk that they will have overpaid. The non-settling defendants will have to pay exactly their share of the harm as proven at trial, regardless of the settlement amount, because the non-settling defendants will have to pay back any judgment credit that exceeds their proven liability to the settling defendants on a claim for contribution. The settling plaintiffs bear the risk that they will settle for too little, because even where the defendants are joint tortfeasors, the capped proportionate share rule requires the non-settling

defendants to pay only up to their proportionate fault, thus exposing plaintiffs to a potential shortfall in recovery. Both the settling defendant and the plaintiff would an incentive to establish that the settling defendant is less at fault, creating a possibility of collusion between the settling parties because the settling defendant would be able to increase the amount of contribution it was entitled to by showing that the non-settling defendant was more at fault, and the plaintiff would want to avoid a situation in which the proportionate share of the settling defendant was found to be greater than the settlement amount.

In contrast, under the non-settling defendants' proposed mutual rule, a settling defendant retains the risk that it will settle for more than its proportionate share of the harm ultimately proved at trial; in exchange, its maximum exposure is limited to the amount for which it settles. The settling plaintiffs are in the same position as under BDO's proposed non-mutual rule. Under the mutual rule, however, the non-settling defendants obtain a potential windfall if the settling defendants settle for more than their proportionate share of the harm, because the non-settling defendants' judgment credit is the *greater* of the settlement amount or the settling defendants' proven proportionate share of liability under the one satisfaction rule. On the other hand, there is no analogous risk of collusion. The settling defendant remains no worse off than if the one satisfaction rule were not in place.

On remand, the district court should consider whether, under the circumstances of this case, which include the possibility that the non-settling defendants benefitted from a similar non-mutual order in the prior settlement of the class-action claims, a non-mutual or a mutual bar

order is most fair to all the parties involved. We also note that the PSLRA has resolved this dilemma in favor of mutual bar orders. *See* 15 U.S.C. § 78u-4(f)(7). While, for the reasons discussed below, we conclude that the PSLRA does not control the outcome of this pre-PSLRA case, the congressional determination that a mutual bar order was the better approach may have some bearing on the district court's resolution of this issue. Finally, we also recognize that at oral argument, counsel for BDO repeatedly indicated that BDO desired a non-mutual bar in order to be allowed to pursue claims against MTC and its parent corporation, Grande Holdings, and *not* Daiwa. This too may be relevant to the district court's consideration as to the scope of any non-mutual bar order on remand.

Accordingly, we vacate and remand that portion of the district court's order approving a non-mutual bar order in the BDO settlement for further consideration and balancing of the competing fairness issues.

V. Applicability of the PSLRA

Finally, the non-settling defendants argue that the bar orders must be mutual for the claims of the nineteen plaintiffs who were added by amendment to the complaint after the effective date of the PSLRA. The district court properly rejected this argument.

Section 108 of the PSLRA provides that the PSLRA's provisions relating to settlement "shall not affect or apply to any private action [brought under the Securities and Exchange Act of 1934] commenced before and pending" on December 22, 1995. 109 Stat. 737, 758 (1995). This statutory language refers to "actions," not to "claims."[9] We agree with the district court's conclusion that the

[9] The non-settling defendants rely on Adler v. Berg Harmon Associates, 790 F. Supp. 1235 (S.D.N.Y. 1992), which held that a

"action" here was commenced when the complaint was filed on January 23, 1995. *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Amending the complaint, even to add additional plaintiffs, did not create a new action. *See McKowan Lowe & Co. Ltd. v. Jasmine, Ltd.*, 976 F. Supp. 293, 297 (D.N.J. 1997). In the absence of any indication to the contrary, we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint. The district court's ruling is therefore affirmed on this issue.

CONCLUSION

In summary, we affirm the bar orders with respect to the settlement judgment credit as construed in light of plaintiffs' concessions on appeal, deny the non-settling defendants' request for greater clarification as to the amount of their judgment credit, modify the language of the bar orders to extinguish only those claims for which the harm to the non-settling defendants is their liability to the plaintiffs, and vacate and remand the bar orders only on the issue of the non-mutuality of the orders.

The parties are to bear their own costs.

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statute permitting reinstatement of civil actions commenced prior to June 20, 1991 did not permit the reinstatement of the claims of a group of plaintiffs who were added by amendment to the original timely complaint after June 20, 1991. Although Adler observed that "[t]he plain language of the statute permits reinstatement only of claims commenced prior to June 20, 1991," id. at 1238, we find that the distinction between "actions"—the phrase actually used in both statutes—and "claims" is significant, and therefore disagree with Adler's reasoning.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

In re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

BAR ORDER, INJUNCTION AND DISMISSAL WITH PREJUDICE OF CLAIMS AGAINST BDO DUNWOODY

On April 24, 2001, after the matter had come on for hearing on January 23, 2001, Chief United States Magistrate Judge A. Simon Chrein issued a Report and Recommendation (the "R&R") on the motion of Defendant BDO Dunwoody ("BDO") to determine, among other things:

(1) Whether the settlement between Plaintiffs in *Kayne, et al., v. MTC Electronic Technologies Co., Ltd. et al.*, Case No. CV-95-2499 (MDL No. 1059) ("*Kayne*") and BDO (the "Settlement") is a good faith settlement under federal law and California law;

(2) Whether, as a result of the Settlement, an order should issue barring all claims against BDO arising out of, in connection with or in any way related to *Kayne* or the allegations therein ("Bar Order");

(3) Whether, as a result of the Settlement, an injunction should issue barring any party from proceeding in any forum with any claim against BDO that is barred or would be barred by a Bar Order; and

(4) Whether, as a result of the Settlement, an order should issue dismissing any and all claims, cross-claims, counterclaims and third party complaints against BDO currently pending before this Court, whether in actions originally filed in this Court or in actions transferred to this Court for consolidated or coordinated pretrial proceedings (the "Motion").

As used herein, "'Non-Settling Defendants' include[s] (1) all defendants, cross-defendants, counter-defendants and third party defendants [other than BDO] in the *Kayne* Action and any related actions pending before this Court, the Class Actions,[1] the Officers and Directors Actions,[2] and the Grande Holdings Actions;[3] and (2) any

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[1] *In re MTC Electronic Technologies Shareholder Litigation*, Case No. CV-93-0876; *Ellis, et al. v. Leung, et al.*, Case No. CV-94-1763.

[2] *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3129, *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3130.

[3] *BDO Dunwoody, v. The Grande Holdings Limited*, Case No. CV-97-4950; *Daiwa Securities America Inc. v. The Grande Holdings Limited*, Case No. CV-98-0336.

other person or entity notified directly or through counsel of this motion." (R&R, at 6 n.4.)

The Court, having considered the papers filed by BDO and Plaintiffs in support of the Motion, the papers submitted by MTC, Daiwa, and the "Non-Leung Individual Defendants" in opposition thereto, the R&R, the objections thereto, and such other and further evidence and argument presented, by Order dated October 26, 2001 adopted the R&R in its entirety with one clarification. (Order, Oct. 26, 2001, at 3.) Pursuant to that order adopting Judge Chrein's R&R, the Court enters the following order:

NOW, THEREFORE, IT IS ORDERED THAT:

1. Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED, and RESTRAINED from commencing, prosecuting, or asserting any claim against BDO arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). (R&R at 20, 25-26.) These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC. (R&R at 25.)

2. All claims against BDO in the consolidated cases before the Court are hereby DISMISSED with prejudice.

3. This Court has not reached, and is not deciding, the issue of whether the Plaintiffs and BDO have reached a good-faith settlement under California law. (R&R at 20.)

4. Any judgment obtained by Plaintiffs in the *Kayne* action against any of the Non-Settling Defendants, or any party other than BDO, shall be reduced by the greater of (a) the amount of BDO's settlement attributed to damages, or (b) the proportionate share of the injury attributable to BDO, as shall be determined at trial. (R&R at 17, 20, 26.) Allocation of amounts within BDO's settlement (to damages, prejudgment interest, and attorneys' fees) shall be subject to the discretion of the trial court. (Order, Oct. 26, 2001, at 3.) This Court, or the district court on remand, shall have exclusive jurisdiction over any dispute with respect to any such matter, subject to the ability of the California state court to apply offsets in the *Berg v. MTC* state court action (No. BC 149408) ("*Berg* Action") as set forth in paragraph 6 below.

5. Neither BDO's settlement agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) Construed as or deemed in any judicial, administrative, arbitration, or other type of proceeding to be evidence of a presumption, concession, or an admission by BDO of the truth of any fact alleged or the validity of any claim that has been, could have been, or in the future might be asserted in the Plaintiffs' Third Amended Complaint, in the *Berg* Action, or in any other action against BDO;

(b) Offered or received into evidence in any judicial, administrative, arbitration, or other type of proceeding for any purpose whatsoever; or

(c) Construed as a concession or an admission by BDO that the Plaintiffs have suffered any damage.

6. The Court, and the district court upon remand, shall have and retain jurisdiction over the parties for all matters related to the administration, interpretation, effectuation, or enforcement of the Settlement and this Order. Should the stay be lifted in the *Berg* Action, this Order shall not preclude the state court from applying any offsets based upon the Settlement and this Order.

7. BDO's claims against any of the Non-Settling Defendants, including those asserted for contribution and indemnity, shall be preserved and are not affected by this order. (R&R at 26.)

8. There is no just reason for delay in the entry of final judgment as to BDO, and the Court hereby directs the clerk to immediately enter judgment as to this Defendant pursuant to Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED

Dated: January 7, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

IN RE MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

—v.—

PARTIAL FINAL JUDGMENT

On January 7, 2002, the Court entered an order dismissing with prejudice all claims brought by the Plaintiffs against Defendant BDO Dunwoody ("BDO").

There are additional claims against other parties that remain in this case.

The Court specifically certifies that there is no just reason for delay of the entry of final judgment as to BDO.

Therefore, the Court ORDERS that Plaintiffs take nothing by their suit against BDO.

Furthermore, the Court hereby DENIES all relief not granted in this judgment, and directs the clerk to enter this, a FINAL JUDGMENT, as to this Defendant.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
CV 93-0876 (JG)

In Re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

Case No. 95-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
KAYNE, et al.,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES,
CO., LTD., etc., et al.,

Defendants.

BAR ORDER, INJUNCTION AND DISMISSAL OF CLAIMS AGAINST HSBC BANK CANADA AND RONALD DRIOL

On April 24, 2001, after the matter had come on for hearing on January 23, 2001, Chief United States Magistrate Judge A. Simon Chrein issued a Report and Recommendation (the "Report") on the motion of third party

defendant HSBC Bank Canada, formerly known as Hongkong Bank of Canada ("HKB Canada") to determine, among other things:

(1) Whether the settlement between Plaintiffs in *Kayne, et al., v. MTC California Electronic Technologies Co., Ltd. et al.*, Case No. CV-95-2499 (MDL No. 1059) ("*Kayne*") and HKB Canada and Ronald Driol ("Driol"), as evidenced by the Settlement Agreement and Release between the Plaintiffs in *Kayne* (the "Plaintiffs"), HKB Canada and Driol dated as of November 30, 2000 (the "Settlement"), is a good faith settlement under federal law and California law;

(2) Whether, as a result of the Settlement, an order should issue barring all claims against HKB Canada and Driol arising out of, in connection with or in any way related to *Kayne* or the allegations therein ("Bar Order");

(3) Whether, as a result of the Settlement, an injunction should issue barring any party from proceeding in any forum with any claim against HKB Canada or Driol that is barred or would be barred by a Bar Order; and

(4) Whether, as a result of the Settlement, an order should issue dismissing any and all claims, cross-claims, counterclaims and third party complaints against HKB Canada and Driol currently pending before this Court, whether in actions originally filed in this Court or in actions transferred to this Court for consolidated or coordinated pretrial proceedings (the "Motion").

As used herein the term "Non-Settling Defendants" means and includes:

(a) All defendants, cross-defendants, counter-defendants and third party defendants, other than HKB Canada and Driol, in *Kayne* and/or any coordinated, consolidated

or related action pending before this Court, including but not limited to:

(1) *In re MTC Electronic Technologies Shareholder Litigation*, Case No. CV-93-0876 ("*In re MTC*");

(2) *Ellis, et al. v. Leung, et al.*, Case No. CV-94-1763 ("*Ellis*" and, collectively with *In re MTC* the "Class Actions");

(3) *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-963129 and/or *Farr, et al. v. Hongkong Bank of Canada, et al.*, Case No. CV-96-3130 (collectively, the "Officer and Director Separate Actions");

(4) *BDO Dunwoody v. The Grande Holdings Limited*, Case No.CV97-4950; and

(5) *Daiwa Securities America Inc. v. The Grande Holdings Limited*, Case No. CV-98-0336; and

(b) Any other person or entity that directly or through his/her/its counsel has been served with notice of the hearing on the Motion.

The Court, having considered the papers filed by HKB Canada and Plaintiffs in support of the Motion, the papers submitted by MTC Electronic Technologies Co., Ltd., now known as GrandeTel Technologies, Inc. ("MTC"), Daiwa Securities America Inc. and the "Non-Leung Individual Defendants" in opposition thereto, the Report, the objections thereto, and such other and further evidence and argument presented, by Order dated October 26, 2001 adopted the Report in its entirety with one clarification.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Each of the Non-Settling Defendants is hereby permanently barred, enjoined and restrained from commencing, prosecuting, or asserting against HKB Canada or Driol any claim or claims arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third party claims, in *Kayne*, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency or forum in the United States, Canada or elsewhere, or in any other manner, including but not limited to offset (collectively, the "Barred Claims").

2. The following claims and actions (collectively, the "Dismissed Claims") are hereby dismissed with prejudice as to HKB Canada and Driol but are not otherwise compromised, settled, released, discharged or dismissed:

(1) The Officer and Director Separate Actions;

(2) The Amended Third Party Complaint of Defendant BDO Dunwoody filed in *Kayne*;

(3) The Third Party Complaint of Robert Farr, Peter Jensen, Thomas Lenagh and Edilberto Pozon in *Kayne* (the "Officers and Directors Third Party Complaint"); and

(4) To the extent not formally dismissed in connection with the settlement of the Class Actions in July 1998, the Amended Third Party Complaints of BDO Dunwoody against HKB Canada and Driol in *In re MTC* and *Ellis*.

3. This Court has not reached, and is not deciding, the issue of whether Plaintiffs and HKB Canada have

reached a good faith settlement within the meaning of federal or California law.

4. Any judgment obtained by the Plaintiffs in *Kayne* against any of the Non-Settling Defendants, or any party other than HKB Canada or Driol, shall be reduced by the greater of (a) the proportionate share of injury attributable to the conduct of HKB Canada and Driol, or (b) the amount of the Settlement Payment (with allocation within the gross figure to damages, prejudgment interest and attorneys' fees to be subject to the discretion of the trial court). This Court, or the District Court upon remand, shall have exclusive jurisdiction over any dispute with respect to any such matter, subject to the ability of California State Courts to apply any offsets in the Kayne State Court Action and the Berg Action as set forth in paragraph 6 below.

5. Neither the Settlement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) Construed as or deemed in any judicial, administrative, arbitration or other type of proceedings, to be evidence of a presumption, concession, or an admission by HKB Canada or Driol of the truth of any fact alleged or the validity of any claim that has been, could have been or in the future might be asserted in Plaintiffs' Third Amended Complaint or the Kayne State Court Complaint, or otherwise against HKB Canada or Driol, or of any purported liability, fault, or other wrongdoing of HKB Canada or Driol.

(b) Offered or received in evidence in any judicial, administrative, arbitration or other type of proceeding for any purpose whatsoever, including,

but not limited to, as a presumption, concession or an admission of any purported liability, wrongdoing, fault, misrepresentation or omission in any statement, document, report, or financial statement heretofore or hereafter issued, filed, approved or made by HKB Canada or Driol or otherwise referred to for any other reason, other than for the purpose of and in such proceeding as may be necessary for construing, terminating or enforcing the Settlement (or applying the judgment reduction rule set forth herein); or

(c) Construed as a concession or an admission that the Plaintiffs have suffered any damage.

6. The Court, and the District Court upon remand, shall have and retain jurisdiction over the parties for all matters relating to the administration, interpretation, effectuation or enforcement of the Settlement and this Order including, but not limited to, resolving disputes on an expedited basis, upon motion, with respect to Sections 3.2 and 3.3 of the Settlement Agreement. Should the stay be lifted in the Kayne State Court Action or the Berg Action, this Order shall not preclude such courts from applying any offsets based upon the Settlement and this Order.

7. HKB Canada's and Driol's claims against the Non-Settling Defendants, including those asserted for contribution and indemnity, are preserved and not affected by this Order.

8. There is no just reason for delay in the entry of judgment pursuant to this Order and immediate entry of judgment by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.:
93-CV-0876 (JG)

In Re MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

95-CV-2499 (JG)
MDL No. 1059

THIS DOCUMENT RELATES TO
FRED KAYNE, et al.

—v.—

MTC ELECTRONIC TECHNOLOGIES
CO., LTD., et al.

PARTIAL FINAL JUDGMENT

On January 8, 2002, the Court entered an order dismissing with prejudice all third-party claims brought against Third-Party Defendants HSBC Bank Canada ("HKB Canada") and Ronald Driol ("Driol").

There are additional claims against other parties that remain in this case.

The Court specifically certifies that there is no just reason for delay of the entry of final judgment as to HKB Canada and Driol.

Therefore, the Court ORDERS that all third-party plaintiffs take nothing by their suits against HKB Canada and Driol.

Furthermore, the Court hereby DENIES all relief against HKB Canada and Driol not granted in this judgment, and directs the clerk to enter this, a FINAL JUDGMENT, as to these Third-Party Defendants.

Dated: January 8, 2002
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Master File No.
93-CV-876(JG)

In re: MTC ELECTRONIC TECHNOLOGIES
SHAREHOLDER LITIGATION

MDL No. 1059
95-CV-2499 (JG)

THIS DOCUMENT RELATES TO:
FRED KAYNE, et al.,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES,
CO., LTD., et al.,

Defendants.

JOHN GLEESON, United States District Judge:

Defendants BDO Dunwoddy ("BDO") and HSBC Bank Canada ("HSBC") seek orders relating to their respective contingent settlement agreements with plaintiffs in *Kayne v. MTC Electronic Technologies. Ltd.* Specifically, plaintiffs and BDO have agreed to settle claims against BDO for a total of $8,000,000, repre-

senting $4,907,975.50 in out-of-pocket damages and $3,092,024.50 in pre judgment interest. Plaintiffs have agreed to settle their claims against HSBC and Ronald Driol, a former officer of HSBC, for a total of $4,075,000, representing $1,300,000 in out-of-pocket damages, $819,000 in prejudgment interest, and $1,956,000 in attorney's fees.

The settling defendants seek a "bar order" which would prohibit further claims against them. Specifically, the settling parties seek an order which (1) finds that they have reached good faith settlements under federal and California law; (2) bars claims by "non-settling defendants" against settling defendants while reserving settling defendants' claims against non-settling defendants;[1] (3) dismisses claims pending against them in this Court, including those transferred for consolidated pretrial proceedings; and (4) approves the allocation of damages and leaves determination of any judgment reduction in favor of non-settling defendants for remand.

I referred the applications for a report and recommendation to the Hon A. Simon Chrein, United States Magistrate Judge. Judge Chrein issued his report and recommendation on April 24, 2001; familiarity with it is assumed. Judge Chrein recommended that I issue an order providing that (1) no "good faith settlement" order should issue; (2) any judgment against the non-settling defendants on the remaining claims will be reduced by the greater of (a) the amount of the settlements or (b) the proportionate share of injury attributable to settling

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[1] "Non-settling defendants" are defined as and include (1) all defendants, cross-defendants, counter-defendants, and third-party defendants in the *Kayne* action and related actions pending in this Court; and (2) any other person or entity notified directly or through counsel of this motion.

defendants; and (3) upon payment of the settlements, the non-settling defendants are barred from asserting any claims arising out of or reasonably flowing from the claims and allegations in the *Kayne* action.

The parties have filed various objections or requests for clarification or for further specification. I have reviewed their submissions as well as the record of proceedings before Judge Chrein, who held a day-long hearing on the application on January 23, 2001.

With one clarification, Judge Chrein's thorough report and recommendation is hereby adopted in its entirety. The clarification is as follows: if a judgment is obtained against a nonsettling defendant, the judgment reduction shall not necessarily be calculated by using the full amounts of the settlements. Rather, allocations of amounts within those gross figures (to damages, prejudgment interest and attorneys' fees) shall be subject to the discretion of the trial court.

As clarified. The report and recommendation is adopted.

SO ORDERED

Dated: October 26, 2001
Brooklyn, New York

/s/ JOHN GLEESON
John Gleeson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Master File No.

93-CV-876 (JG)

MDL No. 1059

In re MTC ELECTRONIC TECHNOLOGIES

SHAREHOLDER LITIGATION

FRED KAYNE, et al,

Plaintiffs,

—against—

MTC ELECTRONIC TECHNOLOGIES, CO., LTD., et al.,

Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE A. SIMON CHREIN

95-CV-2499 (JG)

By order dated December 6, 2000, the Honorable John Gleeson referred the above captioned matter to the undersigned Magistrate Judge for the purpose of preparing a report and recommendation concerning the appli-

cations of Defendants BDO Dunwoody and HSBC Bank Canada for orders that, *inter alia*, (a) determine that their respective contingent settlement agreements with plaintiffs in *Kayne, et al. v. MTC Electronic Technologies. Co., Ltd.* are good faith settlements; and (b) permanently bar and enjoin various claims against them. The non-Leung Individual Defendants, Daiwa Securities of America Inc., and GrandeTel Technologies, Inc. (formerly known as MTC Electronic Technologies Co. Ltd.) (collectively, the "Objectors") oppose the motions. For the reasons stated below, it is my respectful recommendation that the motions be denied in so far as the Applicants seek Orders of Good Faith Settlements but granted as to the Bar Orders, subject to the noted modifications.

BACKGROUND

On or about January 23, 1995, the Plaintiffs filed this action in the Central District of California (the "Kayne Action"). By order dated June 16, 1995, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") transferred the action to this Court for coordinated or consolidated pretrial proceedings with *In re MTC Electronic Technologies Shareholder Litigation* and other related cases pending in this district before Judge Gleeson.[1]

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[1] By order dated October 14, 1998, Judge Gleeson approved settlement of the main action in *In re MTC Electronic Technologies*, 93-CV-0876, and *Ellis v. Leung* (the "Class Actions"). The settlement did not cover the Kayne Action. Additional related cases which are still pending can be categorized as follows: (1) the consolidated and stayed California state court actions, *Berg v. MTC*, No. BC 149408 (the "Berg Action"), which includes claims against BDO, and *Kayne v. HKB*, No. BC 186019 (the "Kayne State Court Action"); (2) the Officers and Directors' actions for contribution in connection with the Class Actions and the Kayne Action, *Farr v. HKB*, 96-CV-3129(JG) and 96-CV-3130(JG) (the "Officers and Directors' Actions"); (3) the

The central allegations concern misrepresentations regarding purported business ventures between MTC Electronic Technologies ("MTC") and various entities in China made to artificially inflate the value of MTC stock in anticipation of a large stock and debt offering in 1993 (the "Joint Venture Fraud"). It is further alleged that during this rise in price of MTC, MTC authorized the issuance of 1.1 million shares to non-existing engineers at no or below market cost and such stock was converted by Miko Leung and his brother, Sit Wa Leung, for their own benefit (the "Leung Stock Fraud"). Plaintiffs additionally allege that nonexistent fax sales were reported on three years of MTC's audited fmancials (the "Fax Fraud"). Finally, Plaintiffs allege that the Directors made misrepresentations in proxy materials mailed to shareholders and arranged for the Grande Group to take control of MTC without soliciting bids.

Plaintiffs have brought this action against MTC; MTC International; MTC Electronics (H.K.); Mona Electronic International; Miko Leung, MTC's former President and Chairman of Board, and Sit Wa Leung, former Secretary and Board Member (the "Leung Brothers"); Robert C. Farr, Peter Jensen, Thomas Lenagh, Edilberto V. Pozon, Ugo Doninelli, Goodwin Wang, and David Wong, former Officers and/or Directors of MTC (the "Officers and Directors" or "non-Leung Individual Defendants"); Alan Leung, son of Sit Wa Leung and former Marketing Manager; Daiwa Securities America, Inc. ("Daiwa"), the underwriter of the offering; and BDO Dunwoody Ward Mallette ("BDO"), a partnership of certified public

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Officers and Directors' action in Canada, including damage claims against HKB, *Jensen v. Leung*, No. C956589 (the "Canadian Action"); and (4) contribution actions against Grande Holding, *BDO v. Grande Holdings Ltd*, 97 Civ. 4950(JG), and *Daiwa v. Grande Holdings Ltd*, 98 Civ. 336(JG).

accountants which served as auditor during the public offering. With one exception,[2] Plaintiffs assert claims against all Defendants for violation of Sec. 10(b) of the Securities Exchange Act and Rule 10b-5, fraud, negligent misrepresentation, and violation of CAL. CORP. CODE § 25400 as well as RICO claims against all but BDO. Additionally, Plaintiffs assert claims against the Leung Brothers and the Officers and Directors for violation of Sec. 20 of Securities Exchange Act and claims against MTC, Doninelli, Pozon, Jensen and Farr for violation of Sec. 14(a) of Securities Exchange Act and breach of fiduciary duty. Plaintiffs seek to recover between $15,000,000 and $16,000,000 in out-of-pocket damages, pre judgment interest, costs pursuant to 28 U.S.C. § 1920, punitive damages in relation to the fraud claims, and treble damages and attorney's fees in relation to the RICO claims.

Daiwa, BDO, and the Officers and Directors have asserted cross-claims against MTC and the Leung Brothers. BDO and the Officers and Directors have also filed third-party complaints against, amongst others, Ronald Driol, a former officer of Hong Kong Bank of Canada ("HKB"), and HKB (now HSBC Bank of Canada, or "HSBC") for contribution under Sec. 10(b) of Securities Exchange Act of 1934 as well as contribution and/or equitable indemnity under California law based on fraud, negligence, negligent misrepresentation and violation of CAL. CORP. CODE § 25400 concerning signature guarantees by Driol. BDO has further sought to include additional allegations relating to a signature guarantee by Driol on a certificate issued to China Investment and Development Company and money laundering by Driol

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[2] The only claims asserted against Alan Leung are fraud, negligent misrepresentation and RICO violations.

and the Bank. The Officers and Directors have also filed separate actions against Driol and the Bank for contribution in connection with the Class Actions and the Kayne Action which are currently pending before this Court. *See Farr v. HKB, et al*, 96-CV-3129 and 96-CV-3130. Neither the Bank nor Driol is a direct defendant in the Kayne Action, as the Plaintiffs' motion for leave to amend the complaint to add them as defendants was denied. However, Plaintiffs have asserted claims against them, including alleged RICO violations, in California state court. *See Kayne v. HKB*, No. BC 186019.

THE PROPOSED SETTLEMENTS

Plaintiffs have reached "contingent settlements" with BDO, HSBC and Driol.[3] Plaintiffs and BDO have agreed to settle claims against BDO for a total of $8,000,000, representing $4,907,975.50 in out-of-pocket damages and $3,092,024.50 in pre-judgment interest. Plaintiffs

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[3] The settlements are in fact voidable. The settlemment agreements contain time frames under which the parties may terminate the agreement. To give non-settling defendants a reasonable period to respond and to permit this Court to adequately review the application, the deadlines set by the settling parties have not been met. While anxious to have this matter resolved, the settling parties have indicated their willingness to go forward with the settlement. The settlement agreements also allow the parties to terminate the agreements if the court order deviates from their proposal in certain respects. In breifing the matter and at oral argument, Plaintiffs raised several alternatives under which they would proceed. This Court recognizes the federal policy of encouraging settlements. While conscious that certain recommendations contained herein, if adopted, might trigger a parties' right to terminate the settlement, "[s]ettlements must not be achieved at the cost of fairness to all of the parties . . ." *In re Del-Val Financial Corp. See. Litig.*, 868 F. Supp. 547, 559-60 (S.D.N.Y. 1994).

have agreed to settle their claims against HSBC and Driol for a total $4,075,000, representing $1,300,000 in out-of-pocket damages, $819,000 in prejudgment interest, and $1,956,000 to attorney's fees.

As this is not a class action, court approval would not ordinarily be required. Court involvement is only necessary because the parties seek a "bar order" which would prohibit further claims against the settling defendants. Specifically, the settling parties request that the Court enter an order which: (1) finds that they have reached good faith settlements under federal and California law; (2) bars claims by "non-settling defendants" against settling defendants while reserving settling defendants' claims against non-settling defendants;[4] (3) dismisses claims pending against them in this Court, including those transferred for consolidated pretrial proceedings; and (4) approves the allocation of damages and leaves determination of any judgment reduction in favor of non-settling defendants for remand. The Objectors oppose the settlements on the following grounds: (1) deferring allocation and judgment credit determination is improper; (2) a good faith determination is inappropriate; (3) the proposed Bar Orders are overly broad and lack the requisite mutuality; (4) the proposed settlement allocations preclude a finding of good faith; and (5) the damage allocations are inadequate.

The matter has been extensively briefed by the settling parties and the Objectors, who have submitted memo-

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[4] "Non-settling defendants" are defined as and include (1) all defendants, cross-defendants, counter-defendants, and third-party defendants in the Kayne Action and related actions pending in this Court, including the Class Actions, the Officers and Directors' Actions, and the Grande Holdings Actions; and (2) any other person or entity notified directly or through counsel of this motion.

randa, affidavits and exhibits. Additionally, this Court heard oral arguments on January 23, 2001.[5] No party has requested to offer further evidence.

DISCUSSION

I. Generally.

A right of contribution, while mitigating the harshness of joint and several liability, may have the effect of deterring settlements. As the Second Circuit noted in *In re Masters Mates & Pilots Pension Plan and IRAP Litigation* ("*In re Masters Mates*"):

> If a nonsettling defendant against whom a judgment had been entered were allowed to seek payment from a defendant who had settled, then settlement would not bring the latter much peace of mind. He would remain potentially liable to a nonsettling defendant for an amount by which a judgment against a nonsettling defendant exceeded a non-settling defendant's proportionate share of fault. This potentially liability would surely diminish the incentive to settle.

957 F.2d 1020, 1028 (2d Cir. 1992). To remedy this problem, some jurisdictions will bar contribution or indemnity claims by non-settling defendants against settling defendants and, to compensate non-settling defendants for their loss, provide for a reduction in any judgment obtained against them by plaintiffs. *See. e.g., In re Masters Mates*, 957 F.2d at 1028; *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989). Claims may be barred

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[5] All references to the transcript of oral argument before the undersigned are herein referred to as "Tr. of 1/23/01."

even where the settling party is not a direct defendant. *See Olin Corp. v. Fisons PLC*, No. Civil A. 93-11166-MLW, 1995 WL 811961 (D. Mass. 1995); *Barton Solvents, Inc. v. Southwest Petro-Chem. Inc.*, 834 F. Supp. 342 (D. Kan. 1993); *Carpenter v. United States* 710 F. Supp. 747, 753 (D. Nev. 1988); *Mattco Forge, Inc. v. Arthur Young & Co.*, 45 Cal.Rptr.2d 581 (Cal. Ct. App. 1995) (California statute).

The most commonly used judgment reduction methods are the pro tanto and proportionate share. The pro tanto method simply reduces the judgment by the amount of the settlement, in accordance with the one satisfaction rule. *See In re Masters Mates*, 957 F.2d at 1029; *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989). While perhaps simpler to apply, there is the risk of collusion as well as the possibility of a judgment reduction inconsistent with proportionate fault, with the non-settling defendant bearing the risk of a low settlement. *See In re Masters Mates*, 957 F.2d at 1029; *Kaypro*, 884 F.2d at 1230. Some jurisdictions therefore require a showing of good faith and a hearing on culpability before approving a pro tanto settlement bar. *See In re Masters Mates*, 957 F.2d at 1029. However, the good faith hearing is not without its disadvantages. It is an inadequate safeguard if too cursory while a thorough hearing risks "bogging down the settlement process in a miniature trial before trial." *Kaypro*, 884 F.2d at 1230 (quoting *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir.1985)); *In re DelVal Financial Corp. Securities Litigation*, 868 F. Supp. 547, 561 (S.D.N.Y. 1994) ("*In re Del-Val*").

In contrast, the proportionate share method reduces the judgment by the percentage of fault attributable to settling defendants as determined at trial. *Kaypro*, 884 F.2d at 1231. Some jurisdictions apply a variation of this

rule, referred to as the "capped" proportionate share method, whereby the judgment is reduced by the greater of the settling defendants' share of fault or the amount of settlement. *See In re Del-Val*, 868 F. Supp. at 563. Under either version of the rule, the plaintiff bears the risk of a bad settlement and so has incentive to obtain a settlement accurately proportioned according to fault. Thus, determination of culpability is deferred until trial and a hearing is generally avoided. The proportionate share rule results in a credit consistent with fault because the credit is determined after a determination of liability. *See In re Masters Mates*, 957 F.2d at 1029. It is also recognized as equitable, punishing each wrongdoer according to his fault. *See Kaypro*, 884 F.2d at 1231. But like the pro tanto rule, the proportionate share rule has its disadvantages. Because the plaintiff bears the risk of a bad settlement, a holdout defendant can make settlement difficult. *See In re Masters Mates*, 957 F.2d at 1029. Additionally, the jury must assess the fault of potentially absent settling defendants, thereby providing non-settling defendants with an "empty chair" defense. *See Kaypro*, 884 F.2d at 1231. Under the pure proportionate share rule, the plaintiff may obtain a windfall while, in contrast, the hybrid rule allows for equitable considerations but also adheres to the single satisfaction rule. *See In re Del-Val*, 868 F. Supp. at 564. There is also potential for unfairness where one non-settling defendant cannot pay a judgment and the other non-settling defendants must bear the burden of paying alone. *See Fluck v. Blevins*, 969 F. Supp. 1231, 1239 (D.Or. 1997) (applying capped proportionate share rule with limited hearing to determine whether non-settling defendants were capable of paying potential judgment and, if not, whether settling defendants were paying fair share of total liability as apportioned among those defendants

who were both solvent and subject to contribution claims).

California law provides that a good faith settlement will bar claims for contribution or indemnity by non-settling defendants, who receive a pro tanto judgment reduction. CAL. CIV. PROC. CODE §§ 877, 877.6. Settling parties in the instant case, while requesting approval under California law,[6] seek to defer determination of the judgment reduction method because of the dispute as to the extent of the parties' liability.[7] Objectors oppose deferral on the grounds that failure to ascertain the judgment credits in advance precludes any determination that they will receive fair value in exchange for termination of their contribution rights. Additionally, they assert they will be prejudiced in their formulation of trial strategy.

Plaintiffs cite *In re Ivan F. Boesky Securities Litigation* ("*Boesky*") in support of the proposition that the court may defer determination of judgment reduction. 948 F.2d 1358, 1369 (2d Cir. 1991) (in accepting set-

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[6] BDO, in its memorandum in support of the present application, argues that the need for good faith analysis applies only to the state claims asserting that, "as set forth in the Order," all others will be reduced by a capped proportionate share reduction. (BDO's Mem. At 9, 11.) However, the proposed order submitted with BDO's application defers the determination of the applicable judgment reduction method. (Markel Aff. Ex. 2 ¶ 5.) Moreover, Plaintiffs have taken the position that the RICO claims are also subject to a pro tanto reduction. (*See* Pl.'s Reply at 8-9)

[7] Plaintiffs argue all Defendants are liable for all of their damages while each Defendant contends it is liable for a distinct portion of damages. (Pl.'s Mem. Supp. BDO's App. at 10-11; Pl.'s Mem. Supp. HSBC's App. at 13-14.) If Defendants' position prevails, there would be no basis to reduce the judgment.

tlement in complex securities class action which contained provision for reduction or satisfaction of any judgment against non-settling defendants to extent necessary to extinguish any claims of non-settling defendants against settling defendants, resolution of issues concerning methods of judgment reduction could be deferred). *See also South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1432 (D.S.C. 1990) (granting bar order in securities fraud class action while reserving for determination at trial method and amount of credit). The Second Circuit agreed with the district court in *Boesky* that "to address those issue [in advance] would have required the making of 'hypothetical findings of law or fact on judgments not yet obtained against nonsettling parties not now before the Court as to claims for contribution or indemnification which they might assert in determination of the liability not yet established.' " 948 F.2d at 1369. The court also based its decision on the potential choice of law questions which might preclude use of a single judgment reduction method for each non-settling defendant. *Id.* However, notably objecting plaintiffs were the appellants in the case and the court considered the fact that neither settling nor non-settling defendants objected to deferral. *Id.* Moreover, the court also affirmed denial of the objecting plaintiffs' motion for a bar order "for similar reasons." *Id.*

In contrast, the Fourth Circuit has held that, despite difficulties involved in the choice, a partial settlement which granted non-settlors a right of setoff in exchange for a bar order should not have been approved where the method of calculating the set-off was to be determined at judgment against non-settlors. *In re Jiffy Lube Sec. Litig*, 927 F.2d 155, 160 (4th Cir. 1991). *See also Fluck*, 969 F. Supp. at 1238; *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1239 (S.D.Tex. 1992). The court rea-

soned that class plaintiffs needed the information to decide whether to accept the settlement. *In re Jiffy Lube*, 927 F.2d at 161. Additionally, advance notice (certainly before the close of discovery and witness preparation) of the method to be used was essential to non-settling defendants for the purpose of preparing for trial. *Id.* For example, the method used would determine the extent to which the settling defendants' wrongdoing was relevant. *Id.* Finally, failure to determine the method of reduction posed the risk non-settling defendants would receive an inadequate credit for the bar imposed. *Id.*

While requesting deferral of determination of the applicable judgment reduction method, the settling parties request that this Court make a finding of good faith under California and federal law and enter an order barring claims by non-settling defendants. Unlike *Boesky*, the non-settling defendants strongly object to deferring the issue on the grounds that they will be prejudiced. Discovery is essentially complete so there is little risk that they will be ill prepared to present evidence of settling defendants' wrongdoing. However, deferral of the issue will burden non-settling defendants with uncertainty regarding trial strategy.[8] While a finding of good faith would arguably alleviate the Fourth Circuit's concern that non-settling defendants might receive an inad-

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[8] BDO argues *In re Jiffy Lube* is distinguishable because a pro tanto reduction applies, at a minimum, to the state claims and thus nonsettling defendants will not be prejudiced by deferral because they know the settlors' fault will be relevant. (BDO's Reply at 1-3, 7 n.9.) Plaintiffs similarly assert that uncertainty exists because conflicting rules apply to the securities and RICO claims. (Pl.'s Reply at 10.) However, these arguments assume that which the settling parties seek to defer. Notably, counsel for HSBC conceded at oral argument that a determination of the appropriate judgment reduction rule is required under the above cited authorities. (Tr. of 1/23/01 at 75.)

equate credit, the settling parties' approach implicitly assumes California law applies. Accordingly, deferring determination of the applicable judgment reduction method until judgment is inappropriate under the circumstances of this case.

II. Choice of Law.

Objectors argue that a good faith finding is inappropriate, asserting that a proportionate share rule should apply to all claims pursuant to federal common law and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Settling parties, while disagreeing in some respects, all take the position that, at a minimum, a pro tanto set off applies to the state claims and the PSLRA is inapplicable.

A. Federal Rule.

In consideration of the desirability of fashioning a uniform rule to govern all claims in a single case, some courts have applied the rules of the forum state to federal claims. *See, e.g, First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenhein, Appel. Dixon & Co.* 631 F. Supp. 1029 (S.D.N.Y. 1986). However, both the Second and Ninth Circuits have decided in favor of creating a uniform national rule of settlement credits in securities cases. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (partial settlement in securities case which bars non-settling defendants from seeking contribution may be approved if liability limited to their collective share); *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989) (pursuant to single satisfaction rule, non-settling defendant is entitled to credit of settlement amount against ~~any~~ judgment obtained by plaintiff against non-settling defendant as long as settlement and

judgment represent common damages). *Cf. In re Masters Mates*, 957 F.2d 1020 (2d Cir. 1992) (in ERISA action, contribution rights against settling defendants extinguished by court approval of fair settlement bar with pro tanto credit preceded by evidentiary hearing and finding of good faith). The courts reasoned that judgment credits affect substantive rights under federal securities law, and adoption of state law would lead to disparate results and create an incentive to form shop. *Kaypro*, 884 F.2d at 1228; *Singer*, 878 F.2d at 599-600. The Third Circuit, reaching the same conclusion, further noted that "the issue is central to a federal regulatory scheme, and, therefore, national uniformity is desirable." *Eichenholtz v. Brenman*, 52 F.3d 478, 486 n.14 (3d Cir. 1995).

In 1994, the Supreme Court adopted a proportionate share judgment reduction rule in the admiralty context. *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). While the Third Circuit has extended *McDermott* to the securities context, *see Eichenholtz*, 52 F.3d at 478, the Second Circuit has not directly ruled on the issue. *Cf. Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) (dismissing as moot appeal in securities fraud action and remanding to the district court to vacate rulings which were subject of appeal, adding, "it would seem unwise in the present instance to leave standing the district court ruling that any judgment against appellant be reduced on a pro tanto basis . . . in light of a recent unanimous decision of the Supreme Court [in *McDermott*] . . ."). However, several courts in this Circuit have applied a capped proportionate share judgment credit. *See Local 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp.2d 130 (E.D.N.Y. 1999) (approving settlement which would bar related claims but allow reduction in any future judgment by use of capped proportionate share method); *In re Del-Val*, 868 F. Supp. 547 (S.D.N.Y.

1994) (holding capped proportionate share rule applies to partial settlement of securities litigation and dismissing contribution claims against settling defendants).

Plaintiffs assert that there is conflicting authority in the Ninth Circuit, citing *Seymour v. Summa Vista Cinema, Inc.*, 809 F.23 1385 (9th Cir. 1987) (applying one satisfaction rule in a securities fraud action), *Kaypro*, 884 F.2d 1222 (9th Cir. 1989) (adopting a pure comparative fault credit), and *DCD Programs, Ltd. v. Leiehton*, 90 F.3d 1442 (9th Cir. 1996) (holding that, pursuant to 13 U.S.C. § 78bb(a),[9] investors could not recover damages on claims of unrealized tax shelter benefits in securities fraud action against developers of investments since they had already recovered any such damages in prior settlement from other defendants),[10] and therefore there is no uniform rule.[11] While warranting consideration, the Ninth Circuit's construction of the settlement credit rule in securities litigation does not

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[9] 15 U.S.C. § 78bb(a) provides, in relevant part, that "no person permitted to maintain a suit for damages under the provisions of this chapter [the Securities Exchange Act of 1934] shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."

[10] While the Ninth Circuit's decision in *DCD Programs* may create doubts about the continued validity of *Kaypro*, the Ninth Circuit has not directly ruled on the issue and, in fact, declined to do so when presented with the question on procedural grounds. *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1436 (9th Cir. 1996) (declining to consider request to alter the Kaypro proportionate fault rule on the grounds that it is inconsistent with § 78bb(a) where defendant conceded applicability of Kaypro in district court and first raised issue on appeal).

[11] However, Plaintiffs appeared to argue in favor of the Kaypro proportionate fault rule during oral argument before the undersigned. (Tr. of 1/23/01 at 61.)

govern a case such as this which was transferred under the multidistrict litigation statute, 28 U.S.C. § 1407(a); rather, "a transferee federal court should apply its interpretations of federal law." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993). *Accord In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (Bader Ginsburg, J.), *affd. sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *In re NASDAQ Market Makers Antitrust Litig.*, 929 F.Supp. 174 (S.D.N.Y. 1996). To the extent a pure proportionate fault rule may be inconsistent with 15 U.S.C. § 78bb(a), the hybrid rule would alleviate that conflict. *See Fluck v. Blevins*, 969 F. Supp. 1231 (D.Or. 1997) (finding conflicting authority in Ninth Circuit's decisions and applying capped proportionate share reduction with limited hearing).

Assuming some form of a proportionate share credit applies, it stands in conflict with California law, which provides for a pro tanto reduction with a fairness hearing. Plaintiffs attempt to minimize this conflict by asserting that the conflict is in fact between two federal rules, namely, the rules applicable to the securities and RICO claims. Plaintiffs cite *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.* in support of their proposition that a pro tanto credit applies to the RICO claims. *Bank Brussels Lambert*, Nos. 93 CIV. 6876, 94 CIV. 2713, 2000 WL 1364272, at *2 (S.D.N.Y. Sept. 20, 2000) (declining to extend *McDermott* to RICO context and granting motion to dismiss GOL § 15-108 defense but denying motion to dismiss fault allocation defense seeking judgment reduction under *Singer*). However, at least one court in this district has endorsed a bar order with a capped proportionate share reduction in a case alleging securities fraud as well as violations of RICO. In *Pollack*, the Court found the non-settling defendants

were adequately protected as to any possible claims by the inclusion of the judgment reduction provision. 49 F. Supp.2d at 132-33. Although the Court acknowledged the unavailability of contribution and indemnification under RICO, the judgment reduction provision in the order made no distinction between claims. *Id.* at 132 n.6, 136. Similarly, courts in other circuits have endorsed some form of the proportionate share rule in securities litigation where RICO claims were also asserted. *See Eichenholtz*, 52 F.3d at 487; *Fluck*, 969 F. Supp. at 1240; *In re Granada Partnership Sec. Litig.*, 803 F. Supp. at 1241. Accordingly, any recovery on the federal claims should be reduced in accordance with the capped proportionate share rule.

B. State Claims.

The allocation of damages on pendent state claims in federal cases should ordinarily be determined by state law because it is outcome-determinative. However, the federal rule stands in conflict with California State law, which provides for a pro tanto reduction with a fairness hearing. Objectors assert that public policy favoring uniformity and discouraging forum shopping as well as practical considerations[12] support application of some version of the federal common law "proportionate share" rule to both state and federal claims.

At least one court has addressed the problem of diverging federal and state rules of contribution bars and set-off calculations in the securities context. While

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[12] Objectors assert that under California choice of law rules, the substantive law of California may not apply. While a majority of Plaintiffs are from California, some are non-residents as are many Defendants. In reaching the recommendation contained herein, I place no reliance on such considerations.

acknowledging that federal law has not entirely preempted the field of securities regulation, the District of Massachusetts concluded the federal rule preempts the state rule which would otherwise disrupt federal policies by allowing plaintiffs to collect on a greater state award. *MFS Mun. Income Trust v. American Med. Int'l. Inc.*, 751 F. Supp. 279, 287 (D.Mass. 1990) (adopting pro tanto credit), *mod'd by In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53 (D. Mass. 1994) (adopting proportionate share rule). In the maritime context, the Central District of California also held that the federal rule preempted the state rule, citing with approval *MFS Municipal Income Trust, Slaven v. BP America, Inc.*, 958 F.Supp. 1472, 1484 (C.D. Cal. 1997). The court began by recognizing the principle that state substantive law, otherwise applicable to state claims in a federal court, "cannot be applied in those limited situations where 'there is a significant conflict between some federal policy or interest and the use of state law.'" 958 F. Supp. at 1478 (quoting *O'Melveny & Meyers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994)). The court then noted the recognized importance of uniformity in maritime case law and held that the federal maritime rule of contribution and proportionate share setoff, as set forth in *McDermott*, preempts application of the California pro tanto approach to settlement in the limited case where both state and federal causes of action are present and where federal causes of action will remain against non-settling defendants. *Id.* at 1483. "Should the plaintiffs eventually recover on both federal and state causes of action, the plaintiffs cannot be permitted to elect the state law settlement provisions so as to circumvent a less favorable recovery under the federal approach." *Id.* at 1484.

While there was no conflict between the federal rule ultimately adopted in *MFS Municipal Income Trust* and the relevant state law, the court's rationale has application here as does the reasoning invoked in *Slaven*. Plaintiffs note that the same underlying conduct is the basis for both the state and federal claims, and indicate an election of remedies would avoid any actual conflict.[13] Permitting Plaintiffs to elect the California settlement provisions in circumvention of potentially less favorable recovery under the federal rule would undercut the policies underlying the uniform federal rule. Notably, it would undermine the policies which supported adoption of a federal rule, by leading to disparate results and creating an incentive to forum shop in cases asserting both federal and state claims. Moreover, it would frustrate the fairness and judicial economy considerations which supported adoption of a proportionate share rule, and which selection was subsequently endorsed by Congress with the passage of the PSLRA. *See* 15 U.S.C. §§ 78u-4(f)(7)(B). I therefore recommend that the applications for bar orders be granted, subject to a capped proportionate share reduction applicable to all remaining claims. The capped proportionate share rule ensures that no matter how the settlement funds are distributed as between damages and other elements, the non-settling defendants will never be required to pay more than their proportionate share of an award as determined by the trier of fact. As the hybrid rule adequately protects the Objectors, it is unnecessary to reach the issue of whether the parties have readied good faith settlements.

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[13] Counsel for Plaintiffs stated that an election of remedies would avoid the apparent conflict between the rules applicable to RICO and securities claims. (Tr. of 1/23/01 at 53-54, 101.)

C. The Private Securities Litigation Reform Act.

The Private Securities Litigation Reform Act was passed by Congress to discourage abusive and frivolous securities litigation. *See* H.R. CONF. REP. NO. 104-369 (1995). Settlement procedure is but one area targeted by the legislation. The PSLRA provides for judgment reduction upon partial settlement of an action, adopting the capped proportionate share rule embraced in *In re Del-Val*. 15 U.S.C. §§ 78u-4(f)(7)(B). However, the PSLRA further provides for a mutual bar order, 15 U.S.C. § 78u-4(f)(7)(A)(ii), whereas, as will be discussed further below, settling defendants might otherwise be permitted to maintain contribution claims against non-settling defendants. The parties disagree as to whether the Act applies to some 19 plaintiffs added to the action, originally filed in January 1995, after the effective date of the Act.[14]

Under Section 108 of the Act, the amendments do not apply to "any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Exchange Act of 1933, commenced before and pending " on December 22, 1995. To the extent there is authority on point, it has been held that the word "commenced" in Section 108 means the date the lawsuit was filed and, thus, the PSLRA does not apply to parties added after the effective date to an action filed before the date of enactment. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293, 298 (D.N.J. 1997). The parties have not cited, nor have I found, any cases to the

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[14] Judge Gleeson previously ruled that the RICO amendment is inapplicable to this action. *In re MTC Elec. Tech. S'holder Litig.*, 74 F. Supp.2d 276 (E.D.N.Y. 1999). Contrary to the Plaintiffs' suggestion (*see* Pl.'s Reply at 3-4), that decision does not mandate a determination that the entire PSLRA is inapplicable.

contrary. Application of pre-PSLRA law is also logical, as applying the Act to only some claims would lead to confusion and inconsistency. I would therefore deem the Kayne Action governed by pre-PSLRA law for the purpose of resolving the damage allocation issues raised in the instant applications.

II. Scope of Bar Order.[15]

A. "Independent" Claims.

As a general rule, bar orders only extinguish "claims in which the damages are 'measured by' the defendant's liability to the plaintiff." *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir. 1994) (order barring all claims involving, arising out of or related to any facts, matters, or transactions connected in any manner with the action impermissibly barred possible independent claims). *See also* 15 U.S.C. § 78u-4(f)(7)(A) (barring contribution claims arising out of action); CAL. CIV. PROC. CODE § 877.6(c) (barring claims for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault). "Although judgment reduction compensates a nonsettling defendant for his lost rights of indemnity and contribution, it does not necessarily compensate him for other

---

[15] The settlors seek to enjoin foreign litigation as well, citing *China Trade & Dev. Corp. v. M. V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp.2d 118, 129 (S.D.N.Y. 1997), *aff'd*, 161 F.3d 115 (2d Cir. 1998); *American Home Assurance Co. v. Insurance Corp. of Ireland*, 603 F. Supp. 636, 642-43 (S.D.N.Y. 1984). Those cases recognized the power of courts to enjoin parallel proceedings in foreign forums to prevent frustration of its policies and threats to the court's jurisdiction. As the non-settling defendants have not raised any objections on this point, I would allow it.

lost claims." *In re Masters Mates*, 957 F.2d at 1033 (settlement of ERISA fiduciary duty class action that barred nonsettling trustee from bringing any claims "arising out of the hiring, retention, monitoring, performance, termination of and/or failure to terminate [investment firm], or relating in any other way to [firm]" was overly broad). Nonetheless, derivative claims disguised or artfully pleaded as direct claims may be barred. *See Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590, 1992 WL 170677, at *3 (S.D.N.Y. July 2, 1992) (approving partial settlement of ten-year old RICO action with order barring claims arising out of or related to settled claims); *Norco Delivery Servs., Inc. v. Owens-Coming Fiberglass, Inc.*, 75 Cal.Rptr.2d 456,461 (Cal. Ct. App. 1998) (after determination of good faith settlement, trial court properly dismissed cross-claims against settling defendant where non-settling defendant failed to adduce evidence of any direct cause of action); *Cal-Jones Props. V. Evans Pac. Corp.*, 264 Cal.Rptr. 737, 740 (Cal. Ct. App. 1989) (good faith settlement barred breach of fiduciary duty claim that was in effect simply an indemnity action).

The settling defendants seek bar orders precluding further related litigation against them. Paragraph 2 of the proposed orders provide that, upon payment of the settlement:

> . . . each of the Non-Settling Defendants is hereby permanently barred, enjoined and restrained from commencing, prosecuting or asserting any claim or claims based upon, relating to, or arising out of the claims or allegations in *Kayne*, including but not limited to claims for indemnity, contribution, equitable indemnity, implied in law indemnity, equitable comparative contribution based on comparative negligence or comparative fault, and partial or com-

> parative indemnity based on comparative negligence or comparative fault . . .

Notwithstanding the limitation to the claims or allegations in the Kayne Action, the orders further specify that the barred claims include but are not limited to the dismissed claims; claims based upon, relating to, arising out of or connected with the claims or allegations in the Berg Action; and claims based upon, relating to, arising out of or connected with investments by or of any of the Plaintiffs in MTC. As to HSBC and Driol, the barred claims also include claims based upon, relating to, arising out of or connected with (1) the claims or allegations in the Kayne State Court Action, the Canadian Action and *Canaccord Capital v. HKB and Driol*, No. C975722; (2) MTC stock or signature guarantees affixed to MTC stock which are the subject of certain allegations in the Kayne State Court Action and the Officers and Directors' Third Party Complaint in the Kayne Action, or MTC stock that is the subject of certain allegations in the Class Actions; (3) the additional allegations sought to be included in the Kayne Action by BDO; and (4) all banking services provided at any time by HKB and/or Driol to, for or on behalf of MTC and/or any of its last or present officers, directors and agents, including services which Ere the subject of certain allegations in the Kayne State Court Action.

This Court cannot anticipate all potential claims which might be barred by such an expansive order. For example, there might be undisclosed facts regarding banking services giving rise to a cause of action for fraud which would be timely. Or, as GrandeTel notes, the present language in the Bank's proposed order might be construed to include unrelated claims arising out of HSBC's ongoing banking relationship with GrandeTel or

claims arising out of personal banking relationships between HSBC and listed persons. (Letter from Sheridan to M. J. Chrein of 1/10/01, at 2.) However, in as much as a claim may exist against BDO in favor of Daiwa arising out of a "comfort letter" provided by BDO and which claim may have been preserved by a tolling agreement between the two parties (Tr. of 1/23/01 at 105-107, 112-13, 123-28), Daiwa is free to present evidence of the letter at trial and, to the tent the letter may have contributed to Plaintiffs' injuries, the judgment credit will adequately protect Daiwa. I therefore recommend that the orders be modified to simply bar the non-settling defendants from asserting any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action.

B. Mutuality.

Objectors assert that the bar should be reciprocal while also arguing that a proportionate share rule applies and that this Court is bound by Second Circuit construction.[16] One court in this Circuit has considered the issue and determined that settling defendants should be allowed to seek contribution from non-settling defendants, reasoning that reduction by the hybrid rule adheres to the one-satisfaction rule while permitting settling defendants to seek contribution fosters equitable apportionment of damages among defendants. *In re Del-Val*, 868 F. Supp. 547, 563-64 (S.D.N.Y. 1994). Although this Court previously approved a mutual bar order

[16] GrandeTel further notes HSBC should have no objection to a mutual bar order because they have already broadly released each other. (Letter from Sheridan to M.J. Chrein of 1/10/01, at 2.) However, HSBC has not withdrawn its opposition to a reciprocal order, even as to GrandeTel.

together with a hybrid judgment credit in *Local 875 I.B.T. Pension Fund v. Pollack*, the mutual bar there was consensual. 49 F. Supp.2d 130 (E.D.N.Y. 1999).

A rule which allows settling defendants, who are buying "peace of mind" and avoiding the costs and risk of litigation, to seek contribution from other defendants who bore the risk in the event they settled for too much seems unfair. However, this Court feels obliged to follow the only precedent in this Circuit especially given that the Objectors were on the receiving end of this benefit in the class settlement.[17] Accordingly, I would approve the provision of the settlement which preserves settling defendants' claims against non-settling defendants.

CONCLUSION

For the reasons set forth above, it is the respectful recommendation of the undersigned that the applications for Good Faith Settlement Orders be denied and the Court enter the requested Bar Orders modified to provide that upon payment of the settlements: (1) the non-settling defendants are barred from asserting any claims arising out of or reasonably flowing from the claims and allegations in the Kayne Action; and (2) any judgment rendered against the non-settling defendants on remaining claims in the Kayne Action, will be reduced by the greater of (a) the amount of the settlements or (b) the proportionate share of injury attributable to settling defendants, as shall be determined at trial.

---

[17] The settlement in the Class Actions preserved claims, including those of Daiwa and the Officers and Directors, against the Leung Brothers while barring claims by the Leung Brothers. (HSBC's Reply at 8.) It should, however, be noted that the Leung Brothers' liability is the product of default.

This report and recommendation has been sent to counsel for BDO, HSBC, Kayne Plaintiffs, the Officers and Directors, Daiwa, and GrandeTel. Counsel for Plaintiffs and the settling Defendants are directed to arrange for service no later than May 4, 2001 upon all other parties appearing in these actions. Any objections to the recommendations contained herein must be filed with the Honorable John Gleeson on or before May 8, 2001. 28 U.S.C. § 636; Fed. R. Civ. P. 6, 72. The recommended bar order, if adopted, would preclude a right of contribution or indemnification by parties who might seek to recover damages from the settling defendants. It is unclear whether every potentially affected party has been notified and afforded an opportunity to be heard on the instant applications. Unless Plaintiffs or settling Defendants can establish that notice was sent, any such party has until June 5, 2001 to file objections. Failure to object will preclude appellate review.

Dated: Brooklyn, New York
April 24, 2001

/s/ A. SIMON CHREIN
A. Simon Chrein
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 12 2003
OFFICE OF THE CLERK

No. 03-244

In The

Supreme Court of the United States

DAIWA SECURITIES AMERICA, INC.,

Petitioner,

v.

FRED KAYNE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS FRED KAYNE, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE H. NAGLER
Counsel of Record
NAGLER & ASSOCIATES
2300 S. Sepulveda Blvd.
Los Angeles, California 90064
Tel.: (310) 473-1200

Attorneys for Respondents Fred Kayne, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

COUNTER-STATEMENT OF QUESTION PRESENTED[1]

Does the Private Securities Litigation Reform Act ("PSLRA") apply to claims being asserted in an action filed prior to its effective date, December 22, 1995?

[1] Plaintiffs-Respondents Fred Kayne, et al ("Plaintiffs") are responding only to the second of two questions raised before this Court by Petitioner Daiwa Securities America, Inc. ("Daiwa"), but understand that Defendant-Respondent BDO Dunwoody is filing an opposition addressing both questions raised by Daiwa.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Plaintiffs-Appellees (Respondents before this Court): Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith, Inc., as Custodian for Milton T. Okun Individual Retirement Accounts; Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb, M.D.; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International, Ltd.; Richard L. Milsner; Joel Rumm, D.M.V.; Victor Scaravilli; Tri S Partners; Dreiländer Beteiligung Objekt DLF 93/14-Walter Fink-KG, a Limited Partnership Formed under the Laws of Germany; and Zwölfte Dreiländer Beteiligung DLF 92/12-Walter Fink-KG, a Limited Partnership Formed under the Laws of Germany.

2. Defendant-Appellee (Respondent before this Court): BDO Dunwoody LLP.

3. Third Party Defendant-Appellee: HSBC Bank Canada.

4. Defendant-Appellant (Petitioner before this Court): Daiwa Securities America Inc.

5. Defendants-Appellants: MTC Electronic Technologies Co., Ltd. (n/k/a GrandeTel Technologies, Inc.); Edilberto Pozon; Peter Jensen; Thomas Lenagh; Robert Farr; Ugo Doninelli; David Wong; and Goodwin Wang.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, nominal respondent Merrill, Lynch & Co., Inc. is a corporation whose stock is not owned at a 10% or greater level by any publicly held company.

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COUNTER-STATEMENT OF THE CASE

A. BACKGROUND OF THE ACTION

Plaintiffs are a group of open-market purchasers who lost more than $15 million investing in MTC Electronic Technologies Co. Ltd. ("MTC") between 1992 and 1994. In the face of allegations of fraud at MTC, Daiwa assured the investing public that MTC indeed had legitimate telecommunications joint ventures in China, and underwrote a $70 million public offering. Eventually, MTC admitted fraud with respect to (1) the theft of MTC stock and below-market stock options purportedly issued to engineers for China telecommunications joint ventures, and (2) falsely reported sales of fax machines in China during the 1991, 1992 and 1993 fiscal years. The purported China telecommunications joint ventures were all written off by 1997.

Various class action litigation was filed against MTC, Daiwa and others in 1993 and 1994. This action, on behalf of opt outs of the class actions, was filed January 23, 1995 in U.S. District Court for the Central District of California against MTC, Daiwa and others and includes claims for federal securities fraud, common law fraud and RICO violations. This action was transferred to the Eastern District of New York in 1995 by the Judicial Panel on Multidistrict Litigation ("JPML") for coordinated discovery proceedings with the MTC class action litigation. Additional plaintiffs joined this action by amendment in 1996 and 1997. Daiwa originally opposed the addition of those new plaintiffs, but ultimately withdrew its opposition after those new plaintiffs filed an action in California state court asserting state law claims and Daiwa needed to justify its request that a stay be imposed in the state court proceeding.

Plaintiffs have been struggling for most of the last eight plus years to have this case remanded to the Central District of California for trial on the merits. Although the class action litigation settled in 1997 and the class action settlement was approved by the district court in 1998, this case remains in the Eastern District of New York. Discovery has concluded, and summary judgment motions by the non-settling defendants, including Daiwa, were denied in 2002.

B. BACKGROUND OF THE PARTIAL SETTLEMENTS AND PROCEDURAL HISTORY

In late 2000, after almost six years of litigation and unsuccessful efforts to reach a global settlement, Plaintiffs agreed to partial settlements with MTC's auditor, defendant-respondent BDO Dunwoody, and third-party defendants HSBC Canada and Ron Driol. The two settlements totaled slightly over $12 million, with portions allocated to prejudgment interest (available for federal securities fraud and California common law fraud) and attorneys fees (available for RICO violations). Although Daiwa's purported "damages" expert estimated Plaintiffs' total out-of-pocket damages at $3,352,690 even if liability was established, Daiwa and the other non-settling defendants nonetheless opposed the settlements and related bar orders on numerous grounds. Among other things, Daiwa argued that the PSLRA applied to the claims of the later-added plaintiffs, which Daiwa claimed impacted the bar orders and judgment reduction rules. Magistrate Judge Chrein (on April 24, 2001), U.S. District Judge Gleeson (on November 1, 2001) and the Second Circuit Panel (on May 15, 2003) unanimously rejected Daiwa's contention that the PSLRA applied to any aspect of this pre-enactment

action. The Second Circuit noted the critical distinction between a "claim" and an "action," and ruled that an "action" is commenced when the complaint is filed. The Second Circuit remanded to the district court for further proceedings related to the issue of whether the bar order issued in connection with the BDO Dunwoody settlement should be mutual or non-mutual as to the non-settling defendants under pre-PSLRA law. The briefing on that issue has now been completed, but no decision has yet been rendered by Judge Gleeson.

REASONS FOR DENYING THE PETITION

This is a particularly inappropriate case for certiorari, given that Daiwa's complaints regarding application of the PSLRA are unlikely to ever recur. *Dunn v. Immigration & Naturalization Service*, 419 U.S. 919 (1974) (Stewart, J., dissenting) (normally appropriate to deny review when legal questions raised unlikely to recur). Thankfully there are not a lot of securities fraud cases still pending in the federal system that were filed prior to December 22, 1995. Accordingly, any ruling regarding the applicability of the PSLRA to the plaintiffs added to this pre-existing action at a later date is extremely unlikely to ever impact any future case. *Cf. Albrecht v. U.S.*, 329 U.S. 599 (1947) (certiorari granted because issue of widespread importance). Resolution of the issue will not affect any interest broader than the parties to this particular case. *Cf. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (certiorari appropriate where issue involved is of broad application), superseded by statute on other issues as stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

There is no conflict among the circuits as to the temporal reach of the PSLRA. *Watt v. Alaska*, 451 U.S. 259 (1981) (Stevens, J. concurring) (certiorari inappropriate where no reason to believe comparable issue will arise in another Circuit in foreseeable future). The only other court to consider the issue of parties added to an action filed before the PSLRA's effective date, *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F.Supp. 293 (D.N.J. 1997), ruled the same way as the Second Circuit did here. Although Daiwa tries to limit that holding to the PSLRA's stay on discovery, the district court in that case, like the court of appeals in this case, considered the effects of the Act in its entirety in correctly determining not to apply it to later-added parties in a pre-enactment action.

The only case with a contrary holding about the meaning of "action" as opposed to "claim" in *any* context cited by Daiwa is *Adler v. Berg Harmon Associates*, 790 F.Supp. 1235 (S.D.N.Y. 1992), a district court decision within the Second Circuit. Unlike the Second Circuit's thoughtful opinion in this case, the district court in that case assumed, without any analysis, that "claim" and "action" are synonymous.

Most fundamentally, however, the Second Circuit was clearly correct. Congress knows the difference between "claims" and "actions", and chose to exempt entire actions pending as of December 22, 1995 from the PSLRA's reach, rather than limiting the reach of the exemption to only "claims" pending as of that date.

Further, there are numerous other reasons presented to the Second Circuit and the district court in this case that were not expressly ruled upon which would likewise justify a determination that the PSLRA did not apply here,

above and beyond the express statutory language barring its application to entire pre-enactment "actions." Thus, even if certiorari were granted and the Second Circuit opinion reversed, there very likely would not be any change in the outcome of *this* case, putting aside the lack of widespread importance of the issue raised.

Finally, certiorari is inappropriate on Daiwa's Question Presented 2(b) in any event, because the Second Circuit remanded to the district court to readdress the issue of the mutuality of the bar order. That issue is thus not yet ripe for this Court's consideration even if certiorari were otherwise appropriate; if the district court decides the bar order must be mutual, Daiwa's arguments on this point would be moot.

THE PSLRA DOES NOT APPLY HERE

Section 108 of the PSLRA, the text of which is set forth in Daiwa's Petition, by its terms provides that the PSLRA "shall not affect or apply to any private *action* arising under Title I of the Securities Exchange Act of 1934 . . . commenced before and pending on the date of enactment of this Act." (Emphasis added.)

As in all statutory construction cases, if the statutory language is plain and unambiguous, the inquiry ceases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Federal Rules of Civil Procedure themselves distinguish between an "action" – referring to all parties – and each party's assertion of separate rights, which is termed a "claim." Compare FRCP 20 ("all persons may join in one action as plaintiffs") and FRCP 21 (any claim against the party may be severed and proceeded with separately).

FRCP 3 provides that an "action is commenced by filing a complaint with the court." As the Second Circuit noted, "(a)mending the complaint, even to add additional plaintiffs, did not create a new action." (Petition for Writ of Certiorari, p. 26a.)

In fact, Daiwa could have claimed "prejudice" in opposing the motion to add the new plaintiffs on the ground that those plaintiffs might otherwise be subject to the PSLRA. Instead, Daiwa ultimately agreed to the amendments (to serve its own litigation strategy in justifying its request for a stay of related state court proceedings in California) joining all plaintiffs in one action, preserving the new plaintiffs' rights under the specific wording of section 108 of the PSLRA. Daiwa should not now be permitted to complain about the result it created.

Moreover, there are other reasons presented to the courts below (but not ruled on) that would also compel the non-application of the PSLRA to this case. While Plaintiffs believe the distinction between a claim and an action to be clear and dispositive of this issue, to the extent it could be argued that it is ambiguous whether Congress intended the Act to apply to later-asserted claims in pre-enactment actions, the analysis used in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States Ex Rel. Schumer*, 520 U.S. 939 (1997) would preclude retroactive application of the PSLRA to the claims of the later-added plaintiffs in this action based on conduct occurring before its effective date. Applying the PSLRA to the claims of the later-added plaintiffs would clearly have a retroactive effect, since various subsections of the PSLRA, beyond those related to bar orders, for the first time limit joint and several liability and responsibility for uncollectible shares of judgments. This would

remove many of the legal consequences that attach to the perpetration of securities fraud. A change in the kind or measure of damage can be enough to create a retroactive effect. *Landgraf*, 511 U.S. at 282-3; *Hughes Aircraft*, 520 U.S. at 947-8.

Additionally, in practical terms there would be tremendous jury confusion in applying different rules to different plaintiffs in the same action. As the Second Circuit noted, "we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of identical claims in a single action, depending on when those plaintiffs were added to the complaint." (Petition for Writ of Certiorari, p. 26a.)

Further, since there was class action litigation against Daiwa based on its role in the MTC fraud pending when the PSLRA was enacted, the tolling principles set forth in *American Pipe Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) would preclude application of the PSLRA to this action. The purpose of *American Pipe* tolling is to discourage other class members from filing separate actions. If a plaintiff's substantive rights could be adversely impacted by changes in law while a class action is pending, that incentive would be destroyed. Such a result cannot be created in the absence of the clearest Congressional intent.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for certiorari. The Second Circuit correctly determined that the PSLRA did not apply to this action. After eight and a half years of litigation, Plaintiffs

should finally be allowed to present their claims at trial to a jury.

Dated: September 12, 2003

Respectfully submitted,

NAGLER & ASSOCIATES
LAWRENCE H. NAGLER

Attorneys for Respondents
Fred Kayne, et al.

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IN THE

Supreme Court of the United States

DAIWA SECURITIES AMERICA INC.,

Petitioner,

—v.—

FRED KAYNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS BDO DUNWOODY, LLP, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY A. MARKEL
Counsel of Record
JOANNA M. BERNARD
CADWALDER, WICKERSHAM
& TAFT LLP
100 Maiden Lane
New York, New York 10038
(212) 504-6000

Attorneys for Respondents
BDO Dunwoody, LLP

Statement of Questions Presented

1. Does the Private Securities Litigation and Reform Act (the "PSLRA") apply to claims asserted in an action filed prior to its effective date, December 22, 1995?

2. Did the Second Circuit Court of Appeals err in entering a bar order precluding the Non-Settling Defendants, including Diawa Securities America Inc. ("Diawa"), from pursuing claims against BDO Dunwoody, LLP ("BDO"), the Settling Defendant, where the damages claimed are, like contribution claims, based on Non-Settling Defendants' liability to the Plaintiffs?

Statement Pursuant To Rule 29.6

Pursuant to Rule 29.6, Respondent BDO makes the following disclosure:

There are no publicly held companies that own 10% or more of the stock of any Respondent.

BDO has no parent company.

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Reasons for Denying the Writ[1]

In this case, the bar order entered by the Second Circuit bars claims for indemnification, contribution, or other claims where the Non-Settling Defendants seek damages based on their liability to the Plaintiffs. As demonstrated below, courts have long recognized that settling defendants can and should be relieved from the threat that non-settling defendants may seek to shift their liability to Settling Defendants by pursuing supposedly "independent claims," where the damages are the same as those resulting from the injury to the plaintiffs. Such claims are properly extinguished by entry of a bar order.

It is a central and undeniable tenet of the legal system that public policy favors settlement. It is also true that settlements must be fair. As the common law of bar orders has evolved, courts have consistently approved the entry of bar orders where they are accompanied by appropriate judgment reduction provisions to protect non-settling parties. Here, the judgment reduction clause puts all of the risk on the Plaintiffs, because it gives the Non-Settling defendants a judgment credit for the *greater* of the Settling Defendant's proportionate fault or the payment attributable to the settlement. Thus, the Non-Settling Defendants will *never* pay more than their proportionate share. Accordingly, the settlement cannot be unfair to the Non-Settling Defendants and the twin policy goals of settlement and fairness are achieved.

On the other hand, allowing the Non-Settling Defendants to pursue claims against the Settling Defendants, where their injury is measured by the amount that they owe to plaintiffs in the underlying litigation and where

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[1] BDO joins in the Brief of Respondents Fred Kayne, et al. In Opposition to Petition For Writ of Certiorari in the section of their Brief that sets forth the reasons for denying the petition.

they are protected by appropriate judgment reduction, would discourage settlement and would be unfair to the Settling Defendants, who have paid to end the uncertainty and risk associated with this litigation.

Finally, the Private Securities Litigation Reform Act does not apply to the nineteen plaintiffs that joined the *Kayne* action after the effective date of the PSLRA. The plain language of the PSLRA governs its application, and that language clearly states that the Act applies only to *actions commenced* after December 22, 1995. As *Kayne*, which was commenced on January 23, 1995, is clearly an action, the PSLRA, by its own terms, does not apply to any plaintiffs in the action, regardless of the date that they joined.

Statement of the Case

A. Background of the Action

This action was filed on or about January 23, 1995, in the Central District of California, but was later transferred to the Eastern District of New York for coordinated and consolidated pre-trial proceedings with other MTC-related cases pending before Judge Gleeson. On October 14, 1998, Judge Gleeson approved the settlement of *In re MTC* and a related class action, *Ellis v. Leung*. Those settlements did not affect the action brought by the Kayne plaintiffs.

Plaintiffs' claims were based on alleged misrepresentations concerning MTC's purported telecommunications joint ventures and business interests in China. The defendants charged in the action included (a) MTC, (b) the former officers and directors of MTC, including its principals, whose alleged misconduct is the primary focus of the Complaint, (c) Diawa which underwrote

MTC's July 1993 public offering, and (d) BDO, which served as an auditor during the public offering.[2]

B. The Partial Settlement

In November of 2000, after seven and a half years of MTC litigation (now more than 10 years), BDO reached a settlement with Plaintiffs in the *Kayne* action. The agreement called for payment of $8 million by BDO in exchange for full settlement of any and all claims that Plaintiffs may have against BDO, in any forum, that are in any way related to the MTC litigation. In connection with the settlement, Plaintiffs and BDO agreed to execute mutual releases with respect to all MTC-related matters. Moreover, in order for BDO to effectuate its goal of being freed from the claims against it, the settlement was conditioned on entry of a bar order that would, *inter alia*, prohibit certain further claims against the Settling Defendants. Accordingly, in December of 2000, the Settling Defendants submitted applications to Judge Gleeson for such an order. On December 6, 2000, Judge Gleeson referred the matter to Chief Magistrate Judge Chrein.

C. Procedural History of the Bar Order

After receiving briefing from the parties and conducting an all-day hearing, Judge Chrein issued a thoughtful and well-considered Report and Recommendation relating to the partial settlements. (Joint Appendix ("JA") 46a-71a). In relevant part, Judge Chrein held that:

- The PSLRA did not apply to the 19 plaintiffs added to the action after the effective date of

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[2] Compared to its co-defendants, BDO had little involvement in the alleged misconduct—at most, BDO is alleged to have played a secondary role in connection with the purported joint ventures. This fact is not necessary, however, to BDO's argument here.

the Act because the Act did not apply to actions filed prior to the date of the enactment, (JA 44a-45a, 65a-66a); and

- The Non-Settling Defendants should be barred "from asserting any claims arising out of or reasonably flowing from the claims and allegations in the Kayne action," including any claims arising out of a comfort letter provided to those defendants by BDO. (JA 29a, 44a-45a, 69a).

On November 1, 2001, Judge Gleeson issued Orders adopting Judge Chrein's recommendations,[3] and dismissed with prejudice the Kayne plaintiffs' claims against BDO. (JA 27a-45a). On January 8, 2002, the District Court entered partial final judgment as to BDO. (Id.).

On appeal, the Second Circuit affirmed the District Court's decision regarding the PSLRA, (JA 25a-26a), and modified the settlement bar order regarding related claims, to make the language of the bar order clearly indicate that it barred indemnity, contribution, or other claims against BDO where the injury to the Non-Settling Defendants is the Non-Settling Defendant's liability to the Plaintiffs.[4] (JA 17a-21a). Moreover, the Second Cir-

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[3] Judge Gleeson made one modification which is not relevant here.

[4] The full text of the modified portion of the settlement order reads:

> Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim *for indemnity of contribution* against BDO *(or any other claim against BDO where the injury to the Non-Settling Defendant is the Non-Settling Defendant's liability to the plaintiffs)*, arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether aris-

cuit vacated and remanded the part of the District Court's order that related to the mutuality of the bar order for further consideration. (JA 21a-25a)

I

THE PSLRA BY ITS TERMS DOES NOT APPLY TO ANY ASPECT OF THIS CASE

In their Petition, the Non-Settling Defendants argue that the Second Circuit erred in concluding that the PSLRA's settlement provisions do not apply to nineteen of the twenty-six *Kayne* plaintiffs. (Petitioners' Brief ("Pet. Br.") 16-20). As discussed below, this contention is directly contradicted by the plain language of the PSLRA and by relevant case law.

A. The Plain Language of the PSLRA and FRCP 3 Preclude the Application of the PSLRA's Settlement Provisions to Any of the Plaintiffs in This Case

The Non-Settling Defendants contend that the Second Circuit should have ruled that the PSLRA's settlement provisions must be applied to the bar order because some of the *Kayne* plaintiffs joined the lawsuit by amendment after December 22, 1995. This reading of the PSLRA is

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ing under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC, *to the extent that the injury to the Non-Settling Defendant under any such claim is its liability to the Kayne plaintiffs*. (Footnote omitted). (JA 20a-21a).

precluded by the plain language of the statute, which, as the Second Circuit noted, explicitly provides that it does "not affect or apply to any private action . . . commenced or pending on the date of the enactment of this Act" (*i.e.*, December 22, 1995). Pub. L. No. 104-67, 109 Stat. 737 (emphasis added); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) (observing that the PSLRA does "not apply to actions commenced before and pending upon its effective date"). Plaintiffs filed their original complaint on January 23, 1995, *eleven months prior to* the PSLRA's enactment date. The addition of new plaintiffs through amended complaints filed in 1996 and 1997 does not alter the fundamental fact that this action was "commenced" before the PSLRA's effective date. *See Edge Partners, L.P. v. Dockser*, 944 F. Supp. 438, 441 (D.Md. 1996) (holding that the PSLRA does *not* apply to securities fraud cases pending before December 22, 1995, *even if* plaintiffs amend their complaint thereafter); *Wallace v. Sys. & Computer Tech. Corp.*, No. Civ. A. 95-CV-6303, 1997 WL 602808, at *1 n.2 (E.D. Pa. Sept. 23, 1997) (rejecting argument that the PSLRA should apply to claims asserted in an amended complaint filed after December 22, 1995, when the original complaint was filed prior to the enactment date).[5]

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[5] The Non-Settling Defendants rather disingenuously argue that courts have applied the PSLRA not only to actions commenced after the enactment date, but to "claims asserted" after that date as well. (JA 16a-17a). The authorities they cite, however, simply do not support this interpretation. (Id.). *See Havenick v. Networth Express, Inc.*, 981 F. Supp. 480, 523 (E.D. Mich. 1997) (noting that the PSLRA "should apply to *all cases* filed after December 22, 1995") (emphasis added); *Hockey v. Medhekar*, No. C-96-0815 HMP, 1997 WL 203704, at *4 (N.D. Cal. Apr. 15, 1997) (holding that the PSLRA "applies to *all private securities actions* filed after December 22, 1995") (emphasis added).

The holdings of the Second Circuit, Judge Gleeson and Chief Magistrate Judge Chrein are supported by the language of Rule 3 of the Federal Rules of Civil Procedure, which provides that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293 (D.N.J. 1997); *Sellers v. O'Connell*, 701 F.2d 575, 578 (6th Cir. 1983) (holding that, under Rule 3, an action was "commenced" on the date the original complaint was filed, despite the later filing of an amended complaint). *McKowan* is directly on point here. The *McKowan* plaintiffs filed their original complaint before the PSLRA's enactment date, then later amended their complaint to add several new defendants after the enactment of the Reform Act. The newly-added defendants argued that the PSLRA's mandatory discovery stay provision applied to them because they were added to the complaint after December 22, 1995. The *McKowan* court disagreed, holding that the plain language of Rule 3 precluded the partial application of the PSLRA: "the word 'commenced' in Section 108 of the Reform Act means the date the lawsuit was filed." *Id.* at 298. Like the Non-Settling Defendants here, the defendants in *McKowan* relied on cases raising the issue of whether the addition of new parties is timely under the applicable statute of limitations. *Id.* The court properly rejected the analogy. *Id.* In *McKowan*, as in this case, the "precise issue" before the court was "what Congress intended by 'commenced or pending on the date of enactment' " in Section 108 of the PSLRA. *McKowan*, 976 F. Supp. at 297. The *McKowan* court analyzed whether the PSLRA partially applied to an action filed prior to the enactment date where defendants were added after that date, and correctly concluded that it did not.[6]

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[6] The Non-Settling Defendants attempt to distinguish *McKowan* by downplaying its importance because it concerned a discovery

B. The Non-Settling Defendants Cite No Authority Whatsoever for the Proposition That the PSLRA Applies to the *Kayne* Plaintiffs Who Joined the Action After December 22, 1995

There is no authority in support of the proposition that, despite the plain language of the PSLRA and Fed. R. Civ. P. 3, the PSLRA should nevertheless apply to parties who join an action after the effective date, when the action was originally commenced before December 22, 1995. In the absence of any such authority, the Non-Settling Defendants rely on cases that discuss an entirely separate issue, namely, whether the addition of new parties relates back to the original complaint for statute of limitations purposes. These cases have no bearing on the issues before this Court.

Non-Settling defendants base their argument on *Adler v. Berg Harmon Associates*, 790 F. Supp. 1235 (S.D.N.Y. 1992), which involved a group of plaintiffs who, by joining a pending action, sought to assert claims that would otherwise have been time-barred by invoking section 27 of the Exchange Act, which revived actions "commenced on or before June 19, 1991" that had been dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). (Pet. Br. 17-18). Although the original complaint had been filed prior to June 19, 1991, the new plaintiffs did not join the action until after that date, and the *Adler* court rejected their claims. Contrary to the Non-Settling Defendants' characterization of the case, however, the language of

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motion is unavailing. (Pet Br. 19, fn. 11). They argue that the court's decision not to stay discovery is "unremarkable" because discovery would have proceeded in the case regardless of the court's ruling, that discovery could have been taken from the defendants as non-parties, and that, in any event, the court had discretion to lift the discovery stay. (Id.). These arguments badly miss the point. The Court decided that an action is commenced by filing a complaint.

section 27A played virtually no part in the court's decision. Rather, the court focused on the three part test under Fed. R. Civ. P. 15(c) for determining when new claims "relate back" to prior claims for statute of limitations purposes. The *Adler* court found that the "mistake" prong of Rule 15(c) was not satisfied, since there was no basis for concluding that the new plaintiffs would have been included in the original complaint but for a mistake of identity. The court did not address in even cursory fashion the question of when the action "commenced."

Moreover, as the Second Circuit noted, the Court in *Adler* refused to allow the reinstatement of claims made prior to the effective date of the statute. (JA 25a-26a, fn. 9). Here, in contrast, we are dealing with an *action* commenced before the enactment of the PSLRA. As the Second Circuit stated, "we find that the distinction between 'actions'—the phrase actually used in both statutes—and 'claims' is significant, and therefore disagree with Adler's reasoning." (Id.) Here, as the language of the PSLRA clearly refers to actions, and not claims, and the action at issue was filed before the effective date of the PSLRA, the PSLRA's provisions are not applicable.

C. Applying the PSLRA to Some Plaintiffs But Not Others Is Illogical

The Non-Settling Defendants' argument that the Second Circuit's holding on this issue has negative policy implications is a real stretch. First, as explained in the Plaintiffs' brief, a situation such as this is unlikely to ever recur, as few securities cases still remain in the court system that are not encompassed by the provisions of the PSLRA. Second, the Non-Settling Defendants' proposed result would unduly strain the courts and be impossible to administer, because plaintiffs in the same action and in the same class would be treated differently

depending on when they joined the class. In the words of the Second Circuit "we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of plaintiffs asserting identical claims in a single action, depending on when those plaintiffs were added to the complaint," (JA 262) and, as the District Court recognized, "applying the Act to only some claims would lead to confusion and inconsistency." (JA 662). Accordingly, public policy favors treating all plaintiffs in the same class the same in order to promote judicial economy and facilitate the prompt and fair administration of claims.

II

THE SCOPE OF THE BAR ORDER IS ENTIRELY APPROPRIATE UNDER APPLICABLE LAW

A. A Bar Order Narrower Than the One Entered in the Second Circuit Would Permit the Non-Settling Defendants to Bring Thinly-Disguised Claims for Contribution Against the Settling Parties

The purpose of a bar order is to encourage settlements by giving settling parties finality in the litigation. *Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir. 1995).[7] This goal would be undermined if courts could only enter narrow bar orders that failed to shield settling defendants "against co-defendants' efforts to shift their

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[7] *See also In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991) ("The justification for imposing a bar to contribution . . . is that . . . the right to contribution removes the incentive to settle . . . "); *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987) (observing that, without a bar order, "partial settlement of any federal securities case before trial is, as a practical matter, impossible").

losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *Id.* Here, the Non-Settling Defendants contend that the bar order entered below is overbroad because it precludes possible claims against BDO ostensibly arising out of BDO's comfort letter, for negligence or for malpractice. This argument fails for a variety of reasons.[8]

First, as noted by the Second Circuit, the Non-Settling Defendants are fully protected by the capped proportionate share rule, which "adequately compensates the non-settling defendants for their indemnity and contribution claims, as well as for any other claims where the harm to the non-settling defendants is based on their liability to the plaintiffs." (JA 18a). Under this rule the Non-Settling Defendants will get a reduction in judgments against them of the greater of the amount BDO paid in settlement or BDO's relative fault. With this rule in place, there is no equitable basis for the Non-Settling Defendants to pursue claims against BDO which effectively claim as damages the Non-Settling Defendants' liability to Plaintiffs, since any liability they may have to plaintiffs will be reduced by BDO's relative fault (indeed, it is highly possible that, due to the size of the Settlement Payments, the Non-Settling Defendants will ultimately pay plaintiffs far *less* than their proportionate share of any judgment).

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[8] The cases Relied on by Non-Settling Defendants are unpersuasive. *In re Cendant Corp Sec. Litig.*, 139 F. Supp. 2d 585 (D.N.J. 2001), is a post-PSLRA case. Indeed, the *Cendant* court distinguished *In re Oil and Gas*, *infra* at 12-13, as "a pre-PSLRA case in which the Court decided to approve a contribution bar which was broader than the current PSLRA language." *Id.*, 139 F.Supp. 2d at 596. Moreover, all three cases, *Cendant*, *In re Sunrise*, 793 F. Supp. 1306 (E.D. Pa. 1992), and *In re Cenco Inc. Litig.*, 642 F.Supp. 539 (N.D. Ill. 1986), are district court cases; the Non-Settling Defendants do not, and can not, point to a single circuit court decision that is contrary to the Second Circuit's holding in this case.

Second, the Non-Settling Defendants' purportedly independent claims arising from BDO's issuance of comfort letters in connection with MTC's July 1993 public offering (as well as their other hypothetical claims) are barred only to the extent that they seek the same damages as claims for contribution or indemnification. As the Second Circuit found, it is fair to bar such claims where the bar order is so limited because the Non-Settling Defendants can *only* be damaged to the extent they are liable to the plaintiffs in the underlying litigation, to the extent of their fault. (JA 19a). Federal courts recognize that "a rose by any other name is still a rose" and do not hesitate to bar non-settling defendants from asserting tort and contract claims that are, in effect, attempts to shift their liability to settling defendants. *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990); *Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590 (WCC), 1992 WL 170677, at *2 (S.D.N.Y. July 2, 1992) (approving settlement bar order precluding claims "arising out of or in any way related to" the claims in the underlying litigation, and rejecting non-settling defendants' argument that the bar order was overbroad).

The combination of the broad judgment reduction provided for here with the limitation of the bar order as provided by the Second Circuit precludes the possibility of any unfairness here. Case law is supportive of this result. In *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 496 (11th Cir. 1992), the non-settling defendants argued that the settlement bar improperly barred their cross-claims for indemnity, breach of fiduciary duty, fraud and negligence against a settling defendant for its failure to disclose the fraudulent activities alleged in the complaint. *Id.* at 492. The Eleventh Circuit concluded that these claims were merely reworded contribution claims because the only injury to the non-settling defendants

was their potential liability to plaintiffs. *Id.* at 496. The court held that:

> The propriety of the settlement bar order should turn upon the interrelatedness of the claims that it precludes, not upon the labels which parties attach to those claims. If the cross-claims that the District Court seeks to extinguish through the entry of a bar order arise out of the same facts as those underlying the litigation, then the District Court may exercise its discretion to bar such claims in reaching a fair and equitable settlement.

Id. The *U.S. Oil & Gas* court recognized, as did the court below, that the important policy in favor of pretrial settlement of complex litigation is best served by bar orders that preclude non-settling defendants from bringing claims that seek the same relief as contribution claims. *Id.* at 493-94.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

GREGORY A. MARKEL
Counsel of Record
JOANNA M. BERNARD
CADWALADER, WICKERSHAM
& TAFT LLP
Attorneys for Respondents
100 Maiden Lane
New York, New York 10038
(212) 504-6000

(3)

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No. 03-244

IN THE

Supreme Court of the United States

DAIWA SECURITIES AMERICA INC.,

Petitioner,

—against—

FRED KAYNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

GARY P. NAFTALIS
Counsel of Record
ALAN R. FRIEDMAN
STEPHEN M. SINAIKO
JENNIFER L. ROCHON
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioner Daiwa Securities America Inc.

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PETITIONER'S REPLY BRIEF

Petitioner Daiwa Securities America Inc. ("Daiwa") respectfully submits this reply brief in further support of its Petition for a writ of certiorari.

In our Petition, we demonstrated that this Court should grant a writ of certiorari in this case because the judgment below -- to the extent that it imposed an overbroad settlement bar order and declined to apply relevant provisions of the Private Securities Litigation Reform Act ("PSLRA") to plaintiffs who first asserted securities claims *after* that statute's effective date -- raises important issues of federal law that are fundamental to the future conduct of this case, as well as complex litigation throughout the country. A ruling on the proper scope of settlement bar orders (an issue as to which existing case law is inconsistent) will advance the resolution of countless multi-party actions pending in the lower federal courts. Moreover, a definitive determination as to the temporal reach of the PSLRA will assist lower federal courts not only in cases under that statute, but also in cases under other statutes with similar language.

Neither BDO Dunwoody, LLP ("BDO") nor the *Kayne* Plaintiffs[1] have effectively rebutted our showing that

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[1] "*Kayne* Plaintiffs" refers to Fred Kayne, Stephen Kayne, Milton T. Okun, Rosemary Okun, Merrill, Lynch, Pierce, Fenner & Smith (as custodian for Milton T. Okun Individual Retirement Accounts), Don Wohl, Glen Tobias, Ken Berg, Robert A. Bronstein, Bronstein Family Trust, Bruce Burnam, Marcia Burnam, Kathleen A. Cohen, William Corbett, Cutler Family Trust of 1989, Martin Goldfarb, Richard Gunther, Harpel Partners, L.P., Harpel Wheelock Partners, L.P., Harpel International Ltd., Richard L. Milsner, Joel Rumm, Victor Scaravilli, Tri S Partners, Dreilander Beteiligung Objekt DLF 93/14-
(footnote continued)

Daiwa's petition raises important issues for this Court. Nor have they come close to showing that the court below correctly resolved those issues. Contrary to BDO's contentions, Daiwa's claims against BDO -- based on, *inter alia*, the comfort letters BDO delivered directly to Daiwa in connection with the July 1993 public offering of securities by MTC Electronic Technologies Co., Ltd. ("MTC") -- are *not* "thinly-disguised claims for contribution." Accordingly, the judgment credit Daiwa received as compensation for the loss of its contribution and indemnity claims (based on BDO's liability to plaintiffs) cannot justify a bar order extinguishing *independent* claims of that sort, premised on breaches of duties BDO owed directly to Daiwa. (*See* Point I, *infra*.) Moreover, neither the *Kayne* Plaintiffs nor BDO offers any persuasive justification for the determination below that provisions of the PSLRA concerning settlement bar orders should not apply to those of the *Kayne* Plaintiffs who first sued Daiwa in 1996 and 1997. (*See* Point II, *infra*.) We respectfully request that the Court grant Daiwa's Petition.

I. The Bar Order in Favor of BDO is Impermissibly Overbroad

BDO does not dispute, nor could it, the rule of law -- founded in basic notions of fairness -- that settlement bar orders, while they may extinguish contribution or equitable indemnity claims for which non-settling parties receive compensation through judgment credit, may not extinguish claims *independent* of contribution or equitable indemnity. *See, e.g., TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir.

Walter Fink-KG and Zwolfte Dreilander Beteiligung DLF 92/12-Walter Fink-KG, all plaintiffs-appellees below and respondents before this Court.

1994); *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1033 (2d Cir. 1992); App. 19a.[2] Nevertheless, BDO argues that the "capped proportionate share" judgment credit provided by the settlement bar order in this case adequately compensates Daiwa for the loss of its independent claims against BDO because those claims are "merely reworded contribution claims." (BDO Br. 11-13.[3]) BDO is wrong.

The "capped proportionate share" judgment reduction rule simply ensures that, in the event plaintiffs should prevail at trial, Daiwa will pay no portion of BDO's liability to the plaintiffs. Judgment reduction does not (and does not purport to) provide compensation for damages caused by BDO's breaches of duties owed directly to Daiwa. The court below recognized as much by entering a bar order that *permits* Daiwa to assert independent claims against BDO. (App. 20a-21a.)

There is, however, no basis for the lower court's determination to extinguish Daiwa's independent claims against BDO "to the extent that the injury to [Daiwa] under any such claim is its liability to the *Kayne* plaintiffs." (App. 18a-20a.) As we have noted, judgment reduction at trial justifies termination of Daiwa's contribution and equitable indemnity claims because it credits Daiwa for any liability arising from BDO's breaches of duties owed to plaintiffs. But to the extent BDO has breached legal duties it owed directly to Daiwa, and to the extent Daiwa *itself* has liability to plaintiffs, judgment credit provides *no* compensation. Thus, if BDO -- by, for example,

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[2] "App. __" refers to the Appendix annexed to Daiwa's Petition for a writ of certiorari.

[3] "BDO Br." refers to the brief filed by BDO in opposition to Daiwa's Petition.

negligence or recklessness in issuing comfort letters to Daiwa -- caused Daiwa *itself* to incur liability to plaintiffs, judgment reduction does not compensate Daiwa for the loss of its right to recover that liability, as an item of damages, from BDO.

For that reason, as we pointed out in our Petition, a number of lower federal courts have correctly held that settlement bar orders may *not* extinguish independent claims against the settling parties, even where damages on those claims overlap with the non-settling defendants' liability to plaintiffs. *See, e.g., In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585, 596 (D.N.J. 2001); *In re Sunrise Sec. Litig.*, 793 F. Supp. 1306, 1321 (E.D. Pa. 1992); *In re Cenco Inc. Sec. Litig.*, 642 F. Supp. 539, 542 (N.D. Ill. 1986). While BDO cites a handful of cases to the contrary,[4] we respectfully submit that those decisions inappropriately ignore the principle that courts may not enter settlement bar orders without providing fair compensation to non-settling parties for all extinguished claims. At best, BDO's citations to authority demonstrate the inconsistency among the lower federal courts regarding an important aspect of practice in securities and other complex litigation -- inconsistency that this Court should resolve by granting a writ of certiorari in this case.[5]

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[4] *See* BDO Br. 12 (*citing In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992); *Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590, 1992 WL 170677 (S.D.N.Y. July 2, 1992); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990)).

[5] BDO also urges that broad bar orders are necessary to encourage settlement because they provide settling defendants with finality and the comfort that they are protected from future litigation. (BDO Br. 10-11.) The goal of encouraging settlement, however, cannot justify

(footnote continued)

II. The PSLRA Applies to Certain of the *Kayne* Plaintiffs

BDO and the *Kayne* Plaintiffs also fail to offer any persuasive response to our showing that the court of appeals erred in failing to apply the settlement-related provisions of the PSLRA to the 19 plaintiffs who asserted their claims by amendments to the complaint in this action in 1996 and 1997 -- well after the PSLRA took effect.

First, neither BDO nor the *Kayne* Plaintiffs has offered adequate support for the notion that parties who did not sue prior to December 22, 1995 could nevertheless avoid the effect of the PSLRA by joining an already-pending action. As noted in our Petition, the court in *Adler v. Berg Harmon Associates*, 790 F. Supp. 1235 (S.D.N.Y. 1992), persuasively rejected the formalistic analysis, premised on a supposed distinction between "claims" and "actions," that BDO and the *Kayne* Plaintiffs advance. (Pet. 17-18.) Moreover, the cases BDO and the *Kayne* Plaintiffs cite on this point -- *Edge Partners, L.P. v. Dockser*, 944 F. Supp. 438, 441 (D. Md. 1996); *Wallace v. Systems & Computer Tech. Corp.*, No. Civ. A 95-CV-6303, 1997 WL 602808 (E.D. Pa. Sept. 23, 1997) and *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293 (D.N.J. 1997) -- similarly do not advance their position. In all three of those cases, plaintiffs filed their action before the enactment of the PSLRA and then the *same plaintiffs* sought to amend their complaint after December 22, 1995. *Edge*, 944 F. Supp. at 439-40; *Wallace*, 1997 WL 602808, at *1; *McKowan*, 976 F. Supp. at 295; *see* Pet. 19 n.11. None of those cases

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depriving non-settling parties, without compensation, of any claims they may have against settling parties, whether those claims are for contribution or equitable indemnity, or are independent in nature.

involved the effect of the PSLRA on plaintiffs who -- like 1996 and 1997 plaintiffs here -- did not sue until *after* the PSLRA took effect.[6]

Second, there is no merit to the *Kayne* Plaintiffs' argument that the filing of the MTC-related class actions somehow insulates from the PSLRA securities claims asserted by opt-out plaintiffs in 1996 and 1997 under the tolling principle enunciated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). (Kayne Br. 7.[7]) Plaintiffs identify no case in which the *American Pipe* doctrine has been applied for any purpose other than to toll the statute of limitations on claims asserted in a class action. Indeed, the only case on point of which we are aware rejected the position plaintiffs advocate. In *ABF Capital Mgmt. v. Askin Capital Mgmt. L.P.*, 957 F. Supp. 1308 (S.D.N.Y. 1997), plaintiffs -- who apparently had opted out of a class action filed in 1995 -- argued that, because of the pendency of the class action, the PSLRA would not apply to bar securities fraud-based RICO claims they asserted in 1996. *Id.* at 1314, 1316. The court rejected that argument:

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[6] The remaining case BDO cites on this point, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999), is similarly irrelevant. The *Waters* court did not consider, much less endorse, any party's attempt to avoid an act of Congress by joining an action that had been pending prior to its effective date. Indeed, because *Waters* was a class action alleging claims in connection with commodities trading -- rather than claims under the Securities Act of 1933 or the Securities Exchange Act of 1934 -- the PSLRA was irrelevant to that case. *Id.* at 1297 n.11.

[7] "Kayne Br." refers to the brief filed by the *Kayne* Plaintiffs in opposition to Daiwa's Petition.

> Plaintiffs also contend that their RICO claim should be permitted to stand because the related [class] action was filed prior to passage of the [PSLRA]. However, the [class action] complaint is irrelevant here. Plaintiffs attempt to analogize their situation to that of a class plaintiff whose time to file a complaint is extended by the filing of a class complaint. There is no support for this novel position. Plaintiffs here have chosen to file a separate complaint, essentially opting out of the putative class action, and thus cannot reap the benefits of the filing of that action. Moreover, tolling a statute of limitations is entirely different from suspending the effect of an act of Congress.

Id. at 1321. This Court likewise should reject plaintiffs' request for an unprecedented and unwarranted extension of the *American Pipe* doctrine.

Third, the *Kayne* Plaintiffs' reference to the retroactivity analysis of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) is irrelevant. As *Landgraf* and subsequent cases have held, Congress has authority to enact statutes applicable to past events, and the "presumption against retroactivity" plaintiffs rely on has no application when Congress expresses its intent to invoke that authority. *Landgraf*, 511 U.S. at 278; *see also Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997). Here, as we noted in the petition, numerous courts have found that section 108 of the PSLRA expressly commands that the statute's amendments to the Exchange Act take immediate, prospective effect. (Pet. 17 n.10.) That express directive encompasses plaintiffs who first asserted their claims after December 22, 1995. Accordingly, and in the face of a clear Congressional directive, the Court need not consider whether the PSLRA's settlement provisions have "retroactive effect" within the meaning of *Landgraf*.

Fourth, plaintiffs incorrectly suggest that Daiwa, by agreeing not to object to the filing of plaintiffs' amended complaint, somehow waived application of the PSLRA to plaintiffs who first sued in 1996 and 1997. The record does not support that contention. To the contrary, Daiwa expressly reserved all of its defenses -- including application of the PSLRA -- as to plaintiffs who first sued after December 1995, advising the District Court in January 1997, that Daiwa and other parties agreed to "withdraw their opposition to the Kayne plaintiffs' motion to amend the Second Amended Complaint (*although preserving all rights to move to dismiss that complaint*)." Any claim of waiver is baseless.

Finally, neither BDO nor the *Kayne* Plaintiffs offer any authority in support of their argument that considerations of "feasibility" could excuse application of the PSLRA in this case to those of the plaintiffs who otherwise would be subject to its terms. (BDO Br. 9-10; Kayne Br. 7.) Initially, there is no substantial conflict between the settlement provisions of the PSLRA and the pre-PSLRA law applicable to the original plaintiffs in many respects. For example:

- Congress codified the principles of *Masters Mates* in the PSLRA by strictly limiting settlement bar orders to contribution claims. *See* 15 U.S.C. § 78u-4(a)(7).
- The PSLRA mandates only mutual bar orders, implementing judicially recognized fairness concerns.

Even if that were not so, applying the PSLRA to some of the plaintiffs would not create the parade of horribles that BDO and the *Kayne* Plaintiffs envision. Because this is not a class action, each plaintiff's damages will have to be individually determined at trial. The settlement proceeds

will logically be allocated according to the individual damages proved at trial and, with that information in hand, determination of judgment credits and application of bar orders -- whether under the PSLRA or pre-PSLRA law -- would be a relatively straightforward matter.

CONCLUSION

For all of the foregoing reasons, and those set forth in Daiwa's Petition, this Court should issue a writ of certiorari to review the judgment of the court of appeals.

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Respectfully submitted,

GARY P. NAFTALIS
Counsel of Record
ALAN R. FRIEDMAN
STEPHEN M. SINAIKO
JENNIFER L. ROCHON
KRAMER LEVIN NAFTALIS &
FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100